(16,929.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 344.

FRED STEARNS, AS COUNTY AUDITOR OF AITKIN COUNTY, MINNESOTA, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA ON THE RELATION OF JAMES N. MARR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Original.	Print.
Citation and service	*a*	1
Writ of error	*c*	1
Assignment of errors	*f*	2
Bond on writ of error	*i*	3
Caption	1	4
Transcript from district court	1	4
Petition for mandamus	1	4
Demand	5	4
Order for alternative mandamus	7	7
Writ of mandamus	8	8
Answer	12	10
Exhibit A—Ballot used at general election of 1896	41	25
Findings of fact	44	28
Conclusion of law	64	38
Judgment	65	38
Settled case	66	39

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	Original.	Print.
Extracts from journal of senate	67	39
Exhibit A—Proceedings before senate committee on elections	77	45
Testimony of Mr. Bullet	79	47
Admissions	94	54
Stipulation as to case	96	55
Judge's certificate to case-made	96	56
Notice of appeal	97	56
Waiver of bond	98	56
Syllabus	99	57
Opinion	101	58
Judgment	124	70
Order for judgment	126	71
Minutes of argument and submission	128	72
Clerk's certificate	131	72

a United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Fred Stearns, as county auditor of the county of Aitkin, State of Minnesota, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota, this 21st day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

To the State of Minnesota.

Due service of the above citation by copy is admitted this — day of June, A. D. 1898.

H. W. CHILDS,
Attorney General of the State of Minn.

b [Endorsed:] Supreme Court of the United States. Fred Stearns, as county auditor of Aitkin county, Minnesota, appellant, *vs.* The State of Minnesota *ex rel.* J. N. Marr, respondent. Citation.

c UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the honorable supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in a suit between The State of Minnesota on relation of James N. Marr, plaintiff, and Fred Stearns, as county auditor of Aitkin county, Minnesota, defendant, wherein was drawn in question the validity of a statute of the State of Minnesota, on the ground of the said statute being repugnant to the Constitution and laws of the United States, and the decision was in favor of the validity of said statute, a manifest error hath happened, to the great damage of said Fred Stearns, as county auditor of Aitkin county, Minnesota, as by his complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with

all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

d Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 21st day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of the Circuit Court of the United States,
District of Minnesota.

Allowed by—
CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

e [Endorsed:] State of Minnesota, in supreme court. State of Minnesota *ex rel.* J. N. Marr, resp't, *vs.* Fred Stearns, county auditor, app'l't. Writ of error.

f STATE OF MINNESOTA:

In Supreme Court.

THE STATE OF MINNESOTA on Relation of James N. Marr, Plaintiff and Respondent,
vs.
FRED STEARNS, as County Auditor of Aitkin County, Minnesota, Defendant and Appellant.

Now comes the said defendant and appellant above named, whose full name is Fred Stearns, and alleges in the above-entitled cause this court in its decision has committed a manifest error against the said defendant, and thereupon the said defendant prays a writ of error to the Supreme Court of the United States in accordance with law.

And said defendant assigns the following errors in the aforesaid judgment of this court, namely:

1st. This court in and by the said judgment held that a certain law of the State of Minnesota, being chapter 168 of the General Laws of Minnesota of the Year 1895, was constitutional and valid.

2nd. The court in and by said judgment adjudged that said statute repealed and amended chapter 8 of the Special Laws of Minnesota for the Year 1865, and did not violate the obligation of a contract contrary to the Constitution of the United States.

3rd. The court in and by said judgment adjudged that said statute repealed and amended chapter sixty-five of the Special Laws of Minnesota of the Year 1870, and did not violate the obligation of a contract contrary to the Constitution of the United States.

g 4th. The court in and by said judgment adjudged that chapter 8 of the Special Laws of Minnesota of the Year 1865 is not a valid contract binding upon the State.

5th. The court in and by said judgment adjudged that chapter sixty-five of the Special Laws of Minnesota of the Year 1870 is not a contract binding upon the State.

6th. The court in and by said judgment adjudged that chapter 8 of the Special Laws of Minnesota of the Year 1865, ratified and validated by the amendment to the constitution of the State of Minnesota of the year 1871, is not a contract binding upon the State, and can be amended or repealed without violating the obligation of a contract.

7th. The court in and by said judgment adjudged that chapter 65 of the Special Laws of Minnesota of the Year 1870, ratified and validated by the amendment to the constitution of the State of Minnesota of the year 1871, is not a contract binding upon the State, and can be amended or repealed without violating the obligation of a contract.

Dated the 21st day of June, 1898.

FRED STEARNS,
By EMERSON HADLEY,
C W. BUNN AND
M. D. GROVER,
His Attorneys.

h [Endorsed:] State of Minnesota, supreme court. State of Minnesota *ex rel.* J. N. Marr, respondent, *vs.* Fred Stearns, as county auditor of Aitkin county, Minnesota, appellant. Assignment of errors.

i Know all men by these presents that we, Kenneth Clark and George H. Prince, are held and firmly bound unto the State of Minnesota in the full and just sum of two hundred and fifty dollars, to be paid to the said State of Minnesota or its attorneys or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, in the supreme court of the State of Minnesota, in a suit pending in said court between The State of Minnesota on relation of James N. Marr, plaintiff, and Fred Stearns, as county auditor of the county of Aitkin and State of Minnesota, defendant, judgment was rendered against the said defendant, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to said State of Minnesota, citing and admonishing it to be and appear at the Supreme Court of the United States, at Washington, on or before the twentieth day of July, A. D. 1898:

Now, the condition of the above obligation is such that if the

said Fred Stearns, as county auditor of the county of Aitkin and State of Minnesota, shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

j KENNETH CLARK. [SEAL.]
GEORGE H. PRINCE. [SEAL.]

Sealed and delivered in the presence of—
GEO. C. POWER.
H. W. PARKER.

Approved by—
CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

k [Endorsed:] State of Minnesota, supreme court. State of Minnesota *ex rel.* J. N. Marr, respondent, *vs.* Fred N. Stearns, county auditor, appellant. Undertaking on appeal.

1 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1897.

STATE OF MINNESOTA, }
County of Aitkin. }

District Court, Fifteenth Judicial Dist.

STATE OF MINNESOTA on Relation of JAMES N. MARR, Plaintiff, }
vs.
FRED STEARNS, as County Auditor of Aitkin County, Minn., Defendant. }

Petition for Writ.

STATE OF MINNESOTA, }
County of Aitkin, } *ss:*

James N. Marr, being first duly sworn, deposes and says that he is a resident, citizen, freeholder and tax-payer of the county of Aitkin in the State of Minnesota. That he has been such resident, freeholder and tax-payer in said county for more than eight years last passed. That during all of said time this affiant has been and now is a large owner and holder of both real and personal property in said county and that all of said property has been during
2 all of said time and now is subject to taxation in said county, and that during all said time all of said property has been taxed in said county, and this affiant has, during all said time, paid taxes on all his said property. That the amount of said taxes that this affiant has been obliged to pay upon said property is a large sum of money, and the amount this affiant has paid during the current year amounts to the sum of more than $150.

Affiant further says that one Fred Stearns is now, and for more

than two years last passed has been the county auditor of said Aitkin county, duly elected, qualified and acting as such.

Affiant further says that the following-described real estate, to wit, the north half (½) of section thirty-five (35) and the northwest quarter (¼) of section seven (7), and the northwest quarter (¼) of the southwest quarter (¼) of section fourteen (14), and the northwest quarter (¼) of the northwest quarter (¼) of section twenty-one (21), all in town forty-seven (47), range twenty-seven (27), in Aitkin county, State of Minnesota, is now subject to taxation in said county and should be upon the tax-rolls of said county for the year 1897.

Affiant further says that said real estate is not now and never has been upon the tax-list of said county of Aitkin, and that the same is not now and never has been taxed in said county, and does not now, and never has borne its just proportion or any proportion of the expenses of the government of said Aitkin county, or
3 the school district, or any other political division of government in which the same is located. That no part of said property is now exempt from taxation.

That on the third day of August, 1897, this affiant caused to be served upon said Fred Stearns, auditor of said Aitkin county, Minnesota, a demand in writing, signed by this affiant, setting forth the fact that this affiant is a resident, citizen, freeholder and tax-payer in said Aitkin county, and describing said real estate and stating that the same was subject to taxation in said county, and that said property was and is untaxed, and demanding of said county auditor that he place said lands on the tax-list of said Aitkin county, and that a just proportion of the taxes of said Aitkin county be extended against said property and collected as other taxes in said county, a copy of which said demand is hereto attached, marked "Exhibit A" and made a part of this affidavit. That said Fred Stearns, as such county auditor, then and there refused and still does refuse to comply with such demand, and then and there refused and now does refuse to place said lands upon the tax-list of said Aitkin county for the purpose of extending said tax against them, or for any other purpose.

Affiant further says that said county auditor has not since the service of said demand placed said lands, or any portion thereof, on the tax-list of said Aitkin county, and has not extended the just proportion or any portion of the taxes of said Aitkin county against said property, and has not collected or caused to be collected
4 any portion of said taxes, but absolutely refuses to take any action regarding said lands in any manner whatever.

Affiant further says that said lands above described and not taxed as aforesaid are of large value, amounting in the aggregate, as this affiant verily believes, to the sum of $5,000, or more.

Affiant further says, that by reason of the facts, that said lands have not been placed upon the tax-list of said Aitkin county, and are not now thereon, and do not bear their just proportion of the expenses of supporting the government of said county and other political divisions in which they are located, this affiant and other

tax-payers of said county have been greatly damaged thereby, in this: That the amount of taxes that this affiant and other tax-payers in said county are obliged to pay on their property in said county is greatly increased and enlarged and enhanced.

Affiant further says that if the said lands which are not taxed were, as they ought to be, taxed and brought to bear their just proportion of such taxes, that the amount of taxes necessary to be levied upon other property in said county would be greatly lessened and decreased.

And further saith not this affiant except that this affidavit is made for the purpose of applying to the court for an alternative writ of mandamus, to be issued out of the district court, in and for the county of Aitkin, directed to Fred Stearns, as such county auditor of Aitkin county, Minnesota, and commanding him as such auditor to place said lands on the tax-list of said Aitkin
5 county, and to extend against said lands the just proportion of the taxes of said county and other political divisions in which the same are located, and to cause said taxes to be collected in the manner required by law, or that he show cause before this court why he should not do so.

Wherefore, this affiant prays for said writ to issue, and for such other and further relief as he may be entitled to in the premises.

JAMES N. MARR.

Subscribed and sworn to before me this fourth day of August, 1897.

[SEAL.] GEORGE T. WILLIAMS,
Notary Public, Aitkin Co., Minn.

STATE OF MINNESOTA, } ss:
County of Aitkin, }

Demand.

You will please take notice, that the undersigned is a resident, citizen, freeholder and tax-payer in the county of Aitkin, in the State of Minnesota. That he has been such for more than eight years last past, and at the date of this notice he owns real and personal property in said county subject to taxation, and the amount of taxes paid by him upon said property for the current year exceeds the sum of $150.

You will further please take notice, that the following-described real estate, to wit: the north half (½) of section thirty-five (35), and the northwest quarter (¼) of section seven (7), and the northwest quarter (¼) of the southwest quarter (¼) of section fourteen
6 (14), and the northwest quarter (¼) of the northwest quarter (¼) of section twenty-one (21), all in town forty-seven (47), range twenty-seven (27) in Aitkin county, State of Minnesota, is not, and never has been, taxed in said county, and that the value of said property is a large sum exceeding, in the aggregate, as the undersigned verily believes, the sum of $5,000, and that all of said property is subject to taxation in said county, and that said prop-

erty has not been placed upon the tax-list of said county for the current year.

That by reason of the fact that this property is not upon the tax-list of said county, and taxes are not paid thereon the undersigned, and other tax-payers of said county, are greatly damaged thereby for the reason that the amount of taxes assessed upon other property in said county to support its government, is greatly increased, and for this reason the undersigned, in his own behalf, and on behalf of other tax-payers in said county, hereby demands that said property, and all thereof, be forthwith placed upon the tax-list of said county, and that the just proportion of taxes be extended against said property and collected as other taxes in said county.

(Signed) JAMES N. MARR.

Dated August 2, 1897.

To Fred. Stearns, county auditor, Aitkin county, Aitkin, Minn.

7 STATE OF MINNESOTA, }
County of Aitkin. }

District Court, Fifteenth Judicial Dist.

STATE OF MINNESOTA on Relation of JAMES N. MARR, Plaintiff, }
vs. }
FRED STEARNS, as County Auditor of Aitkin County, Minn., Defendant. }

Order.

On reading and filing the affidavit of James N. Marr, and on motion of Hon. H. W. Childs, the attorney general of the State of Minnesota, and Messrs. Choate and Merrill, as attorneys for said petitioner, it is

Ordered, that an alternative writ of mandamus be allowed, and that the same do issue out of and under the seal of this court; that the same may be made, by the clerk of this court, returnable on the sixth day of September, 1897, at my chambers, in the First National Bank building, in the city of Brainerd, in the county of Crow Wing, at 3 o'clock in the afternoon on said day, and that the manner of service of said writ shall be by delivering a copy thereof to said Fred Stearns, the county auditor of said Aitkin county, personally, and showing him the original thereof; such service to be made on or before the sixteenth day of August, 1897, and that there
8 shall be also served with said writ a copy of the affidavit upon which it is allowed, and a copy of this order of allowance.

Dated August 6, 1897.

G. W. HOLLAND,
District Judge.

STATE OF MINNESOTA, }
County of Aitkin. }

District Court, Fifteenth Judicial Dist.

STATE OF MINNESOTA on Relation of JAMES N. MARR, Plaintiff, }
vs. }
FRED STEARNS, as County Auditor of Aitkin County, Minn., Defendant. }

Writ of Mandamus.

The State of Minnesota to the above-named respondent:

Whereas, it manifestly appears to us, from the affidavit of the above petitioner, James N. Marr, that he is now, and for more than eight years last past has been, a resident, citizen, freeholder and tax-payer in the county of Aitkin, in this State, and that during all of said time he has been and now is a large owner and holder of both real and personal property in said county, and that during all of said time all of said property has been and now is taxed in said county of Aitkin, and that said affiant has paid a large amount of taxes in said Aitkin county on said property;

9 That one Fred Stearns is now, and for more than two years last past has been, the county auditor of said Aitkin county, duly elected, qualified and acting as such;

That the following-described real estate, to wit, the north half (½) of section thirty-five (35), and the northwest quarter (¼) of section seven (7), and the northwest quarter (¼) of the southwest quarter (¼) of section fourteen (14), and the northwest quarter (¼) of the northwest quarter (¼) of section twenty-one (21), all in town forty-seven (47), range twenty-seven (27), in Aitkin county and State of Minnesota, is now subject to taxation in said county;

That said real estate is not now, and never has been, upon the tax rolls of said Aitkin county, and the same is not now, and never has been, taxed in said county, and it does not now, and never has, borne its just proportion or any proportion of the expenses of the government of said county of Aitkin, or the school district, or any other political division of government in which the same is located, notwithstanding the fact that said property, or any portion thereof, is not now exempt from taxation;

That on the third day of August, 1897, the said petitioner, James N. Marr, did cause to be served upon the said Fred Stearns, said county auditor of said Aitkin county, a demand in writing, signed by said James N. Marr, and setting forth the fact that the said James N. Marr is a resident, citizen, freeholder and tax-payer in said Aitkin county, and describing said real estate and stating

10 that the same was subject to taxation in said county, and that said property was and is untaxed, and demanding of said county auditor that he place said lands on the tax-list of said Aitkin county, and that a just proportion of the taxes of said Aitkin county be extended against said property and be collected as other taxes in said county, as required by law;

That said Fred Stearns, as such county auditor, then and there refused, and still does refuse, to comply with said demand;

That said Fred Stearns, said county auditor, has not, since the service of said demand, placed said lands, or any portion thereof, on the tax-list of said Aitkin county, and has not extended the just proportion, or any proportion, of the taxes of said county against said property, and has not collected or caused to be collected any portion of said taxes, but absolutely refuses to take any action regarding said lands in any manner whatever;

That said lands above described and not taxed as aforesaid are of large value, amounting in the aggregate to more than $5,000;

That by reason of the fact that said lands have not been placed upon the tax-list of said Aitkin county and are not now thereon, and do not bear their just proportion of the expenses of supporting the government of said county and other political divisions in which they are located, the said James N. Marr, and other taxpayers of said county have been greatly damaged thereby in this: that the amount of taxes that the said James N. Marr and other taxpayers in said county are obliged to pay on their property in said county is greatly increased, enlarged and enhanced;

11 That if the said lands which are not taxed were made to bear their just proportion of such taxes that the amount of taxes to be levied upon other property in said county would be greatly lessened and decreased;

And it appearing that the said James N. Marr has no plain, speedy and accurate remedy at law against the said Fred Stearns, said county auditor, for his neglect and omission to place said lands on the tax-list of said Aitkin county, and it further appearing that the said James N. Marr has made application to this court for an alternative writ of mandamus, to be directed to you, commanding that you, the said Fred Stearns, county auditor of said county, do forthwith place said lands on the tax-list of said Aitkin county and to extend against said lands the just proportion of the taxes of said county and other political divisions in which the same are located, and to cause said taxes to be collected in the manner required by law, or that you do show cause before this court why you should not do so.

Now therefore, we do hereby command you, the said Fred Stearns, county auditor of said Aitkin county, in the State of Minnesota, that you do immediately after the receipt of this writ, place upon the tax-list of said county of Aitkin, in the State of Minnesota, the property hereinbefore described, and that you do extend against said property the just proportion of the taxes of said county and other political divisions in which the same are located, and that you do cause the same to be collected in the manner required of you by

12 law, or that you show cause before this court, at my chambers, in the First National Bank building, in the city of Brainerd, in the county of Crow Wing, and State of Minnesota, on Monday the sixth day of September, 1897, at 3 o'clock in the afternoon, why you have not done so.

Witness the Hon. George W. Holland, judge of said district court aforesaid, in said county of Aitkin, this ninth day of August, 1897.

[Seal of the District Court.]

FRANK F. SEAVEY,
Clerk of the District Court in and for County of Aitkin.

STATE OF MINNESOTA, }
County of Aitkin. }

District Court, Fifteenth Judicial Dist.

STATE OF MINNESOTA on Relation of JAMES N. MARR, Plaintiff, }
vs.
FRED STEARNS, as County Auditor of Aitkin County, Minn., Defendant. }

Answer.

First.

Answering the alternative writ of mandamus herein, defendant admits that the relator is now, and for more than eight years last past has been, a resident, citizen, freeholder and tax-payer in the county of Aitkin, this State, as alleged. That defendant is
13 now, and for more than two years last past has been, county auditor of said county. The real estate described in the alternative writ is located in said county.

On August 3, 1897, the relator served upon defendant, as county auditor, a demand in writing as alleged, and defendant refused to comply with said demand.

Second.

I.

Defendant alleges that the north half (N. ½) of section thirty-five (35), township forty-seven (47), range twenty-seven (27), described in the alternative writ of mandamus herein, is, and for several years last past has been, the property of the Saint Paul and Duluth Railroad Company.

That the Saint Paul and Duluth Railroad Company is and has been since June, 1877, a corporation duly created by, and duly existing under the laws of the Territory and State of Minnesota, and especially by and under an act of the legislature of the Territory of Minnesota, entitled, "A bill for an act entitled An act to incorporate the Nebraska and Lake Superior Railroad Company," approved May 23, 1857; and an act of the legislature of the State of Minnesota, entitled, "An act to amend an act entitled 'An act to incorporate the Nebraska & Lake Superior Railroad Company,'" approved March 8, 1861; and an act of the legislature of the State of Minnesota, entitled, "An act to extend the time for the grading and completion of the Lake Superior and Mississippi railroad," approved March 6, 1863,
14 and an act of the legislature of the State of Minnesota, entitled, "An act to execute the trust created by an act of Con-

gress, entitled, 'An act making a grant of lands to the State of Minnesota, to aid in the construction of the railroad from St. Paul to Lake Superior,' approved May 5, 1864, and to grant the said lands to the Lake Superior and Mississippi Railroad Company to aid in the construction of its railroad, and to amend and continue certain acts in relation to said railroad company," approved February 23, 1865; and an act of the legislature of the State of Minnesota, entitled, "An act in relation to the deposit of $20,000, by the Lake Superior and Mississippi Railroad Company, provided for in chapter 2 of the Special Laws of 1865, and to amend said special act," approved February 26, 1866; and an act of the legislature of the State of Minnesota, entitled "An act extending the time for the completion of the Lake Superior and Mississippi railroad," approved March 5, 1867; and an act of the legislature of the State of Minnesota, entitled, "An act relating to the Lake Superior and Mississippi Railroad Company," approved March 5, 1870; and an act of the legislature of the State of Minnesota, approved March 6, 1876, and entitled, "An act to amend title 1, of chapter 34, of the General Statutes relating to corporations," this last-mentioned act appearing also in part, as section 87, of chapter 34, of title 1, of the General Statutes of Minnesota, of 1878; that said above-mentioned act, approved May 23, 1857, was duly accepted by the persons therein named, and the Nebraska and Lake Superior Railroad Company, and such
15 acceptance of said act was duly filed in the office of the secretary of state of Minnesota, on September 12, 1857; that said above-mentioned act, approved March 8, 1861, was duly accepted by the persons therein named and by the Nebraska and Lake Superior Railroad Company, and by the Lake Superior and Mississippi Railroad Company, and such acceptance of said act was duly filed in the office of the secretary of state of Minnesota, on April 13, 1861; that said above-mentioned act, approved March 6, 1863, was duly accepted by the Lake Superior and Mississippi Railroad Company, and such acceptance thereof was duly filed in the office of secretary of state of Minnesota on March 7, 1863; that said above-mentioned act approved February 23, 1865, was duly accepted by the Lake Superior and Mississippi Railroad Company and such acceptance thereof was duly filed in the office of the secretary of state of Minnesota, on February 25, 1865; and that each and all of the foregoing acts of the Territory and State are hereby referred to for greater certainty, and are made a part hereof.

II.

That pursuant to and in accordance with authority so to do, conferred upon it by the aforesaid several acts of the legislature of the Territory and State of Minnesota, the Lake Superior and Mississippi Railroad Company, a corporation duly created by and existing under the several acts, except that approved March 6, 1876, referred to in the preceding paragraph, did, on or about January 1, 1869, make, execute and deliver a certain mortgage
16 and trust deed to J. Edgar Thompson and William G. Moorhead, as trustees thereunder, wherein and whereby said Lake

Superior and Mississippi Railroad Company conveyed and mortgaged to said trustees all the line of said road of said company and all of its franchises (including its franchise to be a corporation), and all property of every kind and description, whether already acquired, to be acquired or thereafter obtained, for the purpose of securing certain bonds of said company, amounting in the aggregate to $4,500,000, which bonds said Lake Superior and Mississippi Railroad Company, for a valuable consideration, made, issued and negotiated at the same time, and by which it covenanted and agreed with the several holders of said bonds to pay the principal of said bonds to their holders at the time in them named, and, further, to pay interest on the principal of said bonds to their holders, semi-annually, at the rate of seven (7) per cent. per annum, on the first day of January and July of each year; that in and by said bonds said Lake Superior and Mississippi Railroad Company also covenanted and agreed, among other things, that if at any time said company should be in default in the payment of any interest upon any of said bonds, and said default should continue sixty (60) days after the maturity and demand of payment of said interest, that thereupon the principal of such bonds should become due and payable forthwith; and said Lake Superior and Mississippi Railroad Company further covenanted and agreed, by said bonds and mortgage and trust deed with the holders of said bonds and the trustees in
17 said mortgage and trust deed, that in case of any default of said company, in paying, either any part of the principal of any of said bonds or of the interest thereon, as by said bonds required, and at the times in them named for such payment, then the trustees under said mortgage and trust deed might and should have the right to forthwith foreclose said mortgage and trust deed; that after the making, as aforesaid, of said bonds and mortgage and trust deed, George Philler and Stephen A. Caldwell were duly, and in accordance with the terms and requirements of said bonds and trust deed and mortgage, and as permitted thereby, substituted as trustees in the place and stead of said Thompson and Moorhead; that thereafter and on or before January 1, 1874, the Lake Superior and Mississippi Railroad Company failed and refused to pay the interest on any of said bonds, though payment of such interest has been duly demanded of said company by the holders of said bonds, and was then due, and on or before January 1, 1874, said Lake Superior and Mississippi Railroad Company became and was in default in the payment of the principal and interest of its said bonds; that upon said default in the payment of interest on said bonds, and after said default had continued more than sixty (60) days from the maturity and demand of payment of said interest, the holders of said bonds elected, as by said bonds and trust deed and mortgage they were in such case expressly permitted to do, to declare and they did declare, on or before January 1, 1875, the principal of all said bonds forthwith due and payable; that thereafter and while
18 said Lake Superior and Mississippi Railroad Company was in default in the payment of both the principal and interest of its said bonds, and after it had so been in default over six months,

the said Philler and Caldwell, trustees under said mortgage and trust deed, the conditions of said bonds and trust deed and mortgage having become broken and foreclosure of said trust deed and mortgage being then authorized according to its terms, began a suit in equity against said Lake Superior and Mississippi Railroad Company and others, in the circuit court of the United States, in and for the district of Minnesota, to foreclose said trust deed and mortgage; that said circuit court duly obtained and had jurisdiction of said action and of said company and of all the parties to said suit; that in said suit such proceedings were duly had thereafter that on or about March 8, 1877, said circuit court, by its decree then duly rendered, ordered, adjudged and decreed that said trust deed and mortgage were a valid and existing lien, prior and superior to any other lien or right whatever, upon all the corporate and other franchises and immunities of said corporation and its rights and privileges as such, and all its property, including its franchise to be a corporation. And that there was then due and unpaid upon said bonds and mortgage and trust deed, the sum of $5,771,260.55, secured by such first lien, and further ordered adjudged and decreed that unless the whole of said sum were paid by said Lake Superior and Mississippi Railroad Company, to the said trustees, within thirty (30) days from the said rendition of said decree, then all of said property, franchises, rights,
19 and immunities, should be sold at public auction, by or under the direction of H. E. Mann, Esq., a master of said circuit court, in one parcel, and as an entire property, to the highest and best bidder therefor, and that the right and equity of redemption of said Lake Superior and Mississippi Railroad Company, and of all others, should be absolutely foreclosed and barred by such sale, in pursuance of said order, and that said sale of all said property should be absolute and without any right of redemption whatever, by any one; that upon payment of the sum bid at such sale by the highest and best bidder, and confirmation of said sale by said circuit court, the said master should execute and deliver a deed, in accordance with said decree, to the purchaser thereof; that thereafter, the said Lake Superior and Mississippi Railroad Company, having neither paid, nor caused to be paid, to said trustees, as or when permitted by said decree, or at any time, any part of the sum by it found and adjudged to be due and payable as aforesaid, and the said thirty (30) days from the entry and rendition of said decree having expired, such further proceedings were had in said suit, in said circuit court, that said H. E. Mann, Esq., master of said court in pursuance of and in full compliance with said decree, and according to the course and practice of said court, and after performing and attending to all the preliminaries and prerequisites required by said decree or practice, did, on May 1, 1877, sell, at public auction, and as one entire property, all the said franchises, rights, immunities and properties of said Lake Superior and Mississippi Railroad Company to William H. Rhawn,
20 Edwin M. Lewis, George Whitney, Nathan Hilles, Frederick R. Shelton, Edward A. Rollins and Fisher A. Baker, for the

sum of $500,000, that sum being the largest amount bid, and the said persons last named being the highest bidders for said franchises, rights, immunities and property; that said sale was authorized by said decree; that the said purchasers at said sale in all respects complied with the requirements and conditions of said decree and sale and their purchase, and fully performed everything of them in any way required, and that thereafter, the said sale and proceedings having been duly reported to said circuit court, that court on June 12, 1877, duly confirmed and approved said sale, ordered said master to make and deliver to said purchasers a deed of all said franchises, rights, immunities and property; that thereafter and on June 14, 1877, said master, in pursuance of and in all respects as authorized by and in accordance with said decree, sale and confirmation, made, executed and delivered to said purchasers and their heirs, successors and assigns a deed, in accordance with the terms of said decree, wherein and whereby there were granted and conveyed to said purchasers, to wit, William H. Rhawn, Edwin M. Lewis, George Whitney, Nathaniel Hilles, Frederick R. Shelton, Edward A. Rollins, and Fisher A. Baker, their heirs, personal representatives, successors, and assigns, all of said franchises, rights, immunities and property; that said deed was duly filed and recorded in the office of the secretary of state of Minnesota on or about June 14, 1877, and is hereby referred to for greater certainty as a part hereof; that by
21 said foreclosure and sale all of the franchises, rights, privileges, immunities and property of the Lake Superior and Mississippi Railroad Company were granted, transferred and conveyed to said purchasers at said sale, their successors and assigns, and that said purchase was made by said purchasers for the use and benefit of the said bondholders of said Lake Superior Railroad Company, and in view of and as permitted by and with the purpose of reorganization and incorporation under and pursuant to an act of the legislature of the State of Minnesota, approved March 6, 1876, and entitled, "An act to amend title 1 of chapter 34 of the General Statutes, relating to corporations;" that thereafter said purchasers and the persons for whose benefit said purchase had been made, as aforesaid, did on or about June 27, 1877, organize and associate themselves as a corporation under and pursuant to and in full compliance with said last-mentioned act, approved March 6, 1876, and were at said date last named duly created and have since duly existed as a corporation under and pursuant to said last-mentioned act, under and by the name of the "Saint Paul and Duluth Railroad Company;" that all the steps required to be taken and things required to be done for incorporation under said act of March 6, 1876, were duly taken and done at the times, in the manner and by the persons by said act specified; that on June 27, 1877, the said purchasers met at St. Paul, Minn., said date being within thirty (30) days of the delivery of the deed to them from said master of the United States circuit court as aforesaid, after notice of the time and exact place
22 of such meeting had been published by said purchasers for at least ten days prior to time of said meeting in some of the

daily newspapers of St. Paul, and at said meeting said purchasers adopted the corporate name of "The St. Paul & Duluth Railroad Company" for the proposed new organization and elected a board, of nine directors of said corporation, and said board thereupon elected a president, secretary, treasurer, and such other officers as said Lake Superior and Mississippi Railroad Company had had and been authorized to elect, and adopted a corporate seal for said St. Paul & Duluth Railroad Company; that thereafter and on or about June 27, 1877, said St. Paul & Duluth Railroad Company made and certified under its corporate seal, attested by its president and secretary, a statement, showing the date of its organization, the corporate name of it adopted, the amount of its capital stock, issued and unissued, common and preferred, the name of its president, secretary, treasurer and other general officers, the number and names of its directors, chosen, as aforesaid at said meeting, and did on said June 27, 1877, cause said statement and said conveyance of said master to said purchasers to be recorded in the office of the secretary of state of Minnesota; that said statement, or record as aforesaid, is hereby referred to for greater certainty as a part hereof; that thereafter, and on or about July 17, 1877, said purchasers, at the foreclosure sale aforesaid, for a valuable consideration, made, executed and delivered to the St. Paul & Duluth Railroad Company, a deed and conveyance wherein and whereby they then granted
23 and conveyed to said last-named company, its successors and assigns, all of the corporate and other franchises, and all the rights, privileges, immunities and property, which they acquired under said master's deed and decree.

III.

That by an act of Congress approved May 5, 1864, and entitled "An act making a grant of lands to the State of Minnesota to aid in the construction of the railroad from St. Paul to Lake Superior," the United States granted to the State of Minnesota for the purposes of aiding in the building of a line of railroad from the city of St. Paul to the head of Lake Superior, being the road authorized to be constructed by and referred to in the said several acts of the Territory and State of Minnesota hereinbefore referred to, every alternate section of public land of the United States designated by odd numbers to the amount of five alternate sections per mile on each side of the said railroad on the line thereof within the State of Minnesota, with the right, in case any lands were lost from the grant before the definite location of the line of road, to select indemnity lands therefor from the lands of the United States nearest to the lines of sections granted as aforesaid, in alternate sections or parts thereof, within twenty (20) miles of said line of road; that said act of Congress approved May 5, 1864, is hereby referred to and made a part hereof; that thereafter by an act of Congress approved July 13, 1866, and entitled "An act to amend an act making a grant of land to the State of Minnesota to aid in the construction of the railroad from St. Paul
24 to Lake Superior approved May 5, 1864," it was provided and enacted that in case it should appear when the line of the

Lake Superior and Mississippi railroad had been definitely located, that the quantity of land intended to be granted by the said act approved May 5, 1864, in aid of the construction of said road should be deficient by reason of the line thereof running near the boundary line of the State of Minnesota, the said company should be entitled to take from other public lands of the United States, within thirty (30) miles of the west line of said road, such an amount of lands as should make up such deficiency, provided, only, that such lands so taken should be in alternate odd-numbered sections; that this act of Congress, approved July 13, 1866, is referred to hereby and made a part hereof; that — the act of the legislature of the State of Minnesota approved February 23, 1865, and hereinbefore referred to in a preceding subparagraph hereof numbered 1, and made a part hereof, the State of Minnesota accepted the said acts of Congress and the grants of land thereby made, and further, by said last-mentioned act of the legislature of the State of Minnesota, said grants of Congress and the lands thereby granted, were, by said State of Minnesota, granted and transferred to and vested in the Lake Superior Railroad Company, its successors and assigns, to aid in the construction of its line of road; that by said act of the legislature of the State of Minnesota, approved March 8, 1861, and hereinbefore referred to, the State of Minnesota granted to the Lake Superior and Mississippi Railroad Company in aid of the con-
25 struction of its line of road, all the swamp lands for seven (7) miles on either side of said line of road, with the further right, that if it should be found that any portion of said swamp lands had been sold or otherwise disposed of within the said seven (7) miles, the amount of said swamp lands granted to said company should be made up of other swamp lands belonging to the said State of Minnesota outside of said seven (7) miles; and with the right, further, that if it should be found that within said seven (7) miles on each side of said company's line of road, there should not be an amount of swamp lands belonging to the State of Minnesota, to at least seven (7) full sections per mile, then the said company should have the right to select from the swamp lands belonging to the State of Minnesota outside of said line and between the Mississippi river, Lake Superior and Rainy lake, other lands in an amount in all equal to seven (7) full sections for each and every mile of said road; that said last-mentioned act of the legislature of the State of Minnesota was duly accepted by said Lake Superior and Mississippi Railroad Company and its said acceptance thereof was duly filed in the office of the secretary of state of Minnesota on April 13, 1861; that afterward by the act of the legislature of the State of Minnesota approved March 6, 1863, and referred to in paragraph 1 hereof and made a part hereof, said swamp-land grant by the State of Minnesota to the said Lake Superior and Mississippi Railroad Company was amended as shown by the provisions of said last-mentioned act; and that said last-mentioned act was duly accepted by said Lake
26 Superior and Mississippi Railroad Company, and its acceptance thereof was duly filed in the office of the secretary of state of Minnesota on March 7, 1863; that the line of road of Lake Superior

and Mississippi Railroad Company authorized by and referred to in the said several acts of the legislature of the Territory and of the State of Minnesota, hereinbefore referred to, and referred to in the said several acts of Congress hereinb-fore referred to, and in aid of which the grants of land were made, as aforesaid, by the United States and the State of Minnesota, was surveyed, located, constructed and completed long prior to the commencement of this proceeding, and within the time and in the manner specified and required by the said several acts of the Territory and State of Minnesota and of Congress, and that the said Lake Superior and Mississippi Railroad Company, and the St. Paul and Duluth Railroad Company, as its successor, in all respects complied with and conformed to the several acts of Congress and of the Territory and State of Minnesota, hereinbefore referred to, and so complied with and conformed to said several acts within the times by said acts allowed therefor, and that said Lake Superior and Mississippi Railroad Company and its successor, the St. Paul and Duluth Railroad Company, in all respects and in proper season complied with and conformed to the provisions, conditions and requirements of the several acts of Congress and of the State of Minnesota granting lands to aid in the building of the said line of road of said Lake Superior and Mississippi Railroad Company, and that by the survey, location, construction and com-

27 pletion of the said line of road, as aforesaid, said Lake Superior and Mississippi Railroad Company and the St. Paul and Duluth Railroad Company became entitled to the lands granted by the said acts of Congress and of the State of Minnesota, hereinbefore referred to, for the purpose of aiding in the building of said line of road; that under and in pursuance of the acts of Congress hereinbefore referred to, and of an act of Congress approved March 3, 1865, and entitled "An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," and of an act of Congress, approved July 13, 1866, and entitled "An act relating to lands granted to the State of Minnesota to aid in constructing railroads," and of the acts of Congress granting swamp lands to the State of Minnesota, the United States duly granted, certified and conveyed to the State of Minnesota, several tracts of land in the county of Aitkin, Minnesota; that the said tract of land hereinbefore particularly described, and one of the parcels described in the alternative writ of mandamus herein, to wit, the north one-half (N. ½) of section thirty-five (35), of town forty-seven (47), range twenty-seven (27), in Aitkin county, Minnesota, is one of the said parcels of lands conveyed to the State of Minnesota by the United States pursuant to the acts of Congress granting swamp lands to said State and thereafter, and on the eighteenth day of August, 1883, said State of Minnesota duly granted and conveyed said tract of land to the St. Paul and Duluth Railroad Company, as the successor of the Lake Superior and Mississippi Railroad Company,

28 pursuant to said acts above referred to, and the said St. Paul and Duluth Railroad Company has ever since said time held and owned, and now holds and owns, said tract of land in fee-simple absolute and as part and parcel of the grants of land made to the

Lake Superior and Mississippi Railroad Company and to the St. Paul and Duluth Railroad Company, its successor, as aforesaid, by the several acts of Congress and the Territory and State of Minnesota hereinbefore referred to, to aid in the construction of the line of road of the Lake Superior and Mississippi Railroad Company and the St. Paul and Duluth Railroad Company, its successor as aforesaid.

IV.

That by an act of the legislature of the State of Minnesota, approved March 3, 1865, and entitled, "An act in relation to the taxation of lands granted to the Lake Superior and Mississippi Railroad Company," it was enacted and provided among other things that said company should annually pay to the State of Minnesota a certain tax amounting to a percentage stated in said act upon the gross earnings of said railroad, and that the payment of said per centum annually as required by said act should be in full of all taxation and assessment whatever; and that whenever any lands theretofore or thereafter granted to the Lake Superior and Mississippi Railroad Company, to aid in the construction or the completion of its road or branches should be contracted to be sold, conveyed or leased by said company, the same should be placed upon the tax-list by the proper officer for taxation as other real
29 estate for the year succeeding that in which such contract for a sale, conveyance or lease thereof should have been made, and that in enforcing the collection of taxes thereon, the title and interest of said company and of any trustee or mortgagee thereof should be in nowise impaired or affected thereby, but that the improvements thereon and all the interest of the purchaser or lessee therein might and should in case of default of the payment of taxes upon said land be sold to satisfy such taxes, and that the provisions of the several acts therefore enacted in relation to the taxation of the lands of said company should be and they were thereby repealed so far as they conflicted with the provisions of the last-mentioned act. That on March 20, 1865, the said Lake Superior and Mississippi Railroad Company, duly accepted said last-mentioned act of the State of Minnesota, approved March 3, 1865, and that on the same twentieth day of March, such acceptance of said act was duly filed in the office of the secretary of state of Minnesota, which act is referred to and made a part hereof. That thereafter, the said railroad was built and constructed by the Lake Superior and Mississippi Railroad Company in reliance upon said act.

That both the Lake Superior and Mississippi Railroad Company and the St. Paul & Duluth Railroad Company, have annually paid to the State of Minnesota and as required and within the time specified by the said act approved March 3, 1865, the proper gross-earnings tax fixed by said act.

30 V.

That neither the Lake Superior and Mississippi Railroad Company nor its successor, the St. Paul & Duluth Railroad Company

ever has sold, or conveyed, any of the said land, the north half of section thirty-five, except as said land was sold, transferred and conveyed as aforesaid from the former to the latter company, and that neither the Lake Superior and Mississippi Railroad Company nor the St. Paul & Duluth Railroad Company has ever leased or contracted to sell, convey or lease any of said land. Said land is in Aitkin county, Minnesota, is not on the assessment-roll or tax-list, and has never been and is not taxed except and unless through taxation on the gross earnings of the railroad, provided by law. The St. Paul & Duluth Railroad Company owns the same and it is not sold or contracted to be sold, and the said company has owned the same for over five years. The said land is not used or necessary to be used in connection with the operation of the railroad but the preferred stock of the St. Paul & Duluth Railroad Company, amounting approximately, to about $5,000,000, is payable and redeemable out of the proceeds of the land grant, and the land grant has been used solely and exclusively for the purpose of raising funds with which to construct, equip, maintain and operate said railroad.

VI.

That said act of the State of Minnesota approved March 8, 1865, and the acceptance of the same duly filed as aforesaid consti-
31 tute a contract that the lands granted by the United States and the State of Minnesota aforesaid should not, until contracted to be sold, conveyed or leased by said company, or its successor, be subject to ordinary taxation as other real estate, but that the payment of the percentage of the gross earnings of said railroad as therein provided should be in lieu of all other taxation, and any attempted repeal or modification of said contract without the consent of said railroad company, or the St. Paul and Duluth Railroad Company, its successor, violates the obligation of a contract contrary to the provisions of the Constitution of the United States and is void, and by reason of the foregoing, said last-described parcel of land is exempt from all taxation, except the payment of the gross-earnings tax by said railroad company and it is not the duty of this defendant to place the said parcel of land upon the tax roll or list of the said county of Aitkin for the current year.

Third.

Defendant further alleges that the piece or parcel of land described in the alternative writ of mandamus herein, to wit, the northwest quarter of section seven (7), of town forty-seven (47), range twenty-seven (27), in Aitkin county, Minnesota, is the property of the Northern Pacific Railroad Company; that the Northern Pacific Railroad Company is a corporation created by the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake
32 Superior to Puget sound, on the Pacific coast, by the northern route." It was authorized to construct its road and exercise its corporate franchises in the State of Minnesota by

an act of the legislature of the State of Minnesota, approved March 2, 1865, entitled "An act to aid in the construction of the Northern Pacific railroad and telegraph line from Lake Superior to Puget sound." That said act of Congress above referred to (section 3) granted ten alternate sections of public land on each side of the line through the State of Minnesota to aid in the construction of said road. That said piece of land above described, to wit, the said northwest quarter (N. W. ¼) of section seven (7), was granted, certified and conveyed by the United States to the Northern Pacific Railroad Company pursuant to said act of Congress above referred to, and the Northern Pacific Railroad Company now owns and holds the same, and for several years last past has owned and held the same, by title in fee-simple absolute, as a part of the lands granted to it as aforesaid. That the said Northern Pacific Railroad Company has never contracted to sell or leased or conveyed the same, or any part thereof.

That by an act of the legislature of the State of Minnesota, approved March 4, 1870, entitled "An act in relation to the taxation and to facilitate the construction of the Northern Pacific railroad," being chapter 65 of the Special Laws of Minnesota of the Year 1870, it was enacted and provided that the lands, franchises, property, stock and capital of the Northern Pacific Railroad Company shall be liable to assessment and taxation at the same rate and in the same manner, and not otherwise,
33 and shall be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property and franchises of the Lake Superior and Mississippi Railroad Company, as provided in and by an act entitled "An act in relation to the taxation of lands granted to the Lake Superior and Mississippi Railroad Company," approved March 3, 1865, provided, however, that the gross earnings of said railroad company on which a percentage is to be paid to the State, shall include only the earnings of that portion of the Northern Pacific railroad constructed and operated by said company within the limits of the State of Minnesota, which act is hereby referred to and made a part hereof, as is also the said act approved March 3, 1865, entitled "An act in relation to the lands granted to the Lake Superior and Mississippi Railroad Company." That the Northern Pacific Railroad Company duly filed an acceptance of the terms and conditions of said act of March 4, 1870, and thereafter constructed its road through the State of Minnesota in reliance thereon. That the percentage of the gross earnings of said railroad provided to be paid in said act of March 4, 1870, and said act of March 3, 1865, has been duly paid to the treasurer of the State of Minnesota each year as provided for in said acts. That by reason of said act of March 4, 1870, said northwest quarter of section seven (7), town forty-seven (47), of range twenty-seven (27), is exempt from all ordinary taxation and assessment as other lands are taxed, and is not liable to taxation in any other manner save by the payment of the percentage on the gross earnings of said railroad as afore-
34 said. That it is not the duty of this defendant to place this land upon the tax-list of said county of Aitkin, in the State

of Minnesota, or to extend any taxes against said property for the current year. That said act of the State of Minnesota, approved March 4, 1870, and the acceptance of the same, duly filed as aforesaid, constitute a contract that the lands granted by the United States and the State of Minnesota to the Northern Pacific Railroad Company should not, until contracted to be sold, conveyed or leased by said company, or its successor, be subjected to the ordinary taxation as other real estate, but that the payment of the percentage of the gross earnings of said railroad as therein provided, should be in lieu of all other taxation, and any attempt to repeal or modification of said contract without the consent of said railroad company violates the obligation of said contract contrary to the provisions of the Constitution of the United States and is void.

Fourth.

Defendant alleges that the Minneapolis and St. Cloud Railroad Company, now, by change of name, the Great Northern Railway Company, is a railway corporation organized under the laws of this State, and operating a railroad therein. By act of the legislature of this State, approved February 11, 1865, lands were granted by the State to the Minneapolis and St. Cloud Railroad Company, to aid in the construction of its line of railway, and under said act and acts amendatory thereof and supplemental thereto, the northwest quarter of the southwest quarter, of section fourteen (14), township
35 twenty-seven (27), range forty-seven (47), was conveyed by the State to the Great Northern Railway Company as a parcel of the land granted to the Minneapolis and St. Cloud Railroad Company to aid in the construction of its line of railway.

Said parcel of land is exempt from taxation except as provided in sections one and two, chapter 111, Special Laws of this State, for the year 1873.

The Great Northern Railway Company has not accepted said act but it has become subject to its provisions under an act entitled "An act for the taxation of railroad companies," approved March 7, 1887.

Three (3) per cent. of the gross earnings of the line of railway operated by the Great Northern Railway Company, and of the lines constructed and operated under its charter, has been paid each year to the State, at the time and in the manner provided in said act, by reason whereof it was not the duty of this defendant to place the said parcel of land upon the tax roll or list of said county of Aitkin for the current year.

Fifth.

The laws under which the property described in the alternative writ is exempt from assessment and taxation, as hereinbefore alleged, are still in force, unless such laws have been amended or repealed by the provisions of chapter 168 of the Laws of 1895, entitled "An act relating to the taxation of certain lands owned by railroad com-

panies in this State, and repealing laws and parts of laws
36 relating to the taxation of the same, and to provide for the submission of this act to the people of this State for their approval or rejection."

Sixth.

Defendant alleges that said chapter has not become a law.

(*a.*) At the general election in November, 1894, Hon. Knute Nelson was elected governor of this State. He qualified and entered upon the discharge of the duties of his office.

Hon. D. M. Clough was elected lieutenant governor of this State. He duly qualified and entered upon the discharge of the duties of his office, and became *ex officio* president of the senate of this State.

There were at the general election of the State in November, 1894, duly elected fifty-four senators for a term of four years from January, 1895, and all of said senators duly qualified and entered upon their duties as senators, and said senate was organized with fifty-four members on January 8, 1895. That Frank A. Day was the senator elected from the sixth senatorial district of this State at said election for said term of four years, and on said eighth day of January he duly qualified and entered upon the discharge of his duties as said senator. That on the twenty-fifth day of January, A. D. 1895, said Frank A. Day was duly elected president *pro tempore* of said senate, and continued to hold that office up to January 31, 1895.

On the thirty-first day of January, 1895, Hon. Knute Nelson, who was then governor of this State, having theretofore been
37 elected United States Senator for the State, resigned the office of governor. On the same day, Hon. D. M. Clough, who was at that time lieutenant governor, and *ex officio* president of the State senate, resigned his office as lieutenant governor, and qualified and became governor of the State.

On the same day, and after the resignation of Hon. D. M. Clough as lieutenant governor, said Frank A. Day, as president *pro tempore* of the senate of Minnesota, became lieutenant governor and *ex officio* president of the senate. He qualified as such, and entered upon the duties of such office, and continued to perform such duties until his successor was elected and qualified.

The office of senator from the sixth senatorial district of this State became vacant on the thirty-first day of January, 1895 and was not filled until the general election in November, 1896. At such election Hon. H. H. Dunn was elected senator from said sixth senatorial district of the State. He duly qualified as such, and became a member of the senate.

(*b.*) During the session of the legislature of the State commencing in January, 1895, being the twenty-ninth session of such legislature, there was introduced into the house of representatives, one of the branches of said legislature, a bill for an act entitled "An act relating to the taxation of certain lands owned by railroad companies in this State, and repealing laws and parts of laws relating to the taxation of the same, and to provide for the submission of this act to the

people of this State for their approval or rejection," of which
38 chapter 168 of the Laws of 1895, hereinbefore referred to, is a copy. Such bill was declared passed by the house of representatives, and was by such house transmitted to the senate on the ninth day of February, 1895, and it appears upon the journal of the senate, and it is true, that the said bill was received in the senate, referred to a committee, reported back to the senate and put upon its final passage on the thirteenth day of March, 1895, and that the roll of the senate and its yeas and nays being called upon the final passage of the bill, there were twenty-eight votes in its favor, and no more; and that among those voting yea, or in favor of the passage of the bill, was the lieutenant governor and president of the senate, Frank A. Day; and that, excluding the vote of the said Frank A. Day, there were only twenty-seven senators voting yea, or in favor of the passage of the bill, and twenty-seven is not a majority of all the members elected to the senate, and that said bill was never passed by said senate except as above stated. Said bill was thereafter signed by said Frank A. Day, as president of the senate, and transmitted to the governor, and it received his approval on the nineteenth day of March, 1895.

(c.) At the general State election held in November, 1896, a ballot was prepared by the secretary of state and used by the electors of the State. A copy of this ballot is hereto attached and made a part of this answer, and marked "Exhibit A."

House file number one, being chapter 168 of the Laws of
39 1895, was not attached to said ballot, or referred to in said ballot in terms or by reference to title or otherwise. Neither was the substance of said house file or bill indicated at the bottom of the ballot. Said house file or chapter was not submitted to a vote of the people of the State, and it was not adopted and ratified by a majority of the electors of the State at the election held in November, 1896.

Seventh.

None of the county canvassing boards of the State of Minnesota appointed to canvass the returns of the general election of November, 1896, in said State, did make, prepare or certify a statement and deposit the same in the office of the county auditor of their respective counties of the total number of ballots cast in each election district in their respective counties at the general election held on November 3, 1896, and none of the county auditors made and certified a copy of any such statement containing the whole number of ballots cast in each election district in their said counties at said election, under his official seal or otherwise, and forwarded the same to the secretary of state at St. Paul, Ramsey county, Minnesota, either by mail or in any other manner, and no report or statement or return of canvass was sent to the secretary of state or the State canvassing board of the whole number of votes cast at said election; and the said State canvassing board that canvassed the returns of the general election of November, 1896, did not have before them any return

or statement of the total number of votes cast at said election. No report was made to the State canvassing board of the whole number of votes cast at the said election, nor of the whole number of voters voting at said election. The State canvassing board did not canvass the whole number of votes cast, nor the whole number of voters voting, at said election. Such canvassing board did not report or certify as to the whole number of votes cast, nor the whole number of voters voting, at said election, and said canvassing board has not reported or certified that said house file 1, or chapter 168, received a majority of all the votes cast by the electors of the State at said election.

Wherefore defendant prays that the alternative writ of mandamus herein be discharged, and that the defendant be permitted to go hereof without day, and for such other and further relief as may be proper.

HADLEY & ARMSTRONG.

41 EXHIBIT A.

Put a cross-mark (X) opposite the name of each candidate you wish to vote for in the squares indicated by the arrow.

Presidential Electors.

Vote for nine.

Presidential elector—T. B. Walker—Republican—McKinley.	
Presidential elector—E. G. Holmes—Republican—McKinley.	
Presidential elector—Burdette Thayer—Republican—McKinley.	
Presidential elector—Charles H. Budd—Republican—McKinley.	
Presidential elector—James Quirk—Republican—McKinley.	
Presidential elector—Valora D. Eddy—Republican—McKinley.	
Presidential elector—C. A. Smith—Republican—McKinley.	
Presidential elector—Warren Potter—Republican—McKinley.	
Presidential elector—M. R. Brown—Republican—McKinley.	
Presidential elector—Wilson Borst—Democrat—Bryan. People's—	
Presidential elector—Chas. d'Autremont—Democrat—Bryan. People's—	
Presidential elector—John H. Ives—Democrat—Bryan. People's—	
Presidential elector—Harlow H. Bonniwell—Democrat—Bryan. People's—	
Presidential elector—John Day Smith—Democrat—Bryan. People's—	
Presidential elector—Sylvester Kelliher—People's—Bryan. Democrat—	
Presidential elector—T. J. Meighen—People's—Bryan. Democrat—	
Presidential elector—Hans B. Bjorge—People's—Bryan. Democrat—	
Presidential elector—James Dillon—People's—Democrat—Bryan.	
Presidential elector—James P. Pinkham—Prohibition—Levering.	
Presidential elector—Ole Kron—Prohibition—Levering.	

42 Presidential elector—Benjamin W. How—National—Palmer. Democrat—	
Presidential elector—John Von Rohr—National—Palmer. Democrat—	
Presidential elector—Anton Schaefer—National—Palmer. Democrat—	
Presidential elector—T. N. Simmons—National Democrat—Palmer.	
Presidential elector—Ernest Schrader—National—Palmer. Democrat—	
Presidential elector—A. Ueland—National Democrat—Palmer.	
Presidential elector—Wilson G. Crosby—National—Palmer. Democrat—	
Presidential elector—Lyman B. Everdell—National—Palmer. Democrat—	
Presidential elector—Edwin E. Fisher—Socialist—Matchett. Labor—	
State Ballot.	
Governor—David M. Clough—Republican.	
Governor—John Lind—Democrat—People's.	
Governor—Wm. J. Dean—Prohibition.	
Governor—Albert A. Ames—Independent.	
Governor—Wm. B. Hammond—Socialist—Labor.	
Governor—	
Lieutenant governor—John L. Gibbs—Republican.	
Lieutenant governor—J. M. Bowler—People's—Democrat.	
Lieutenant governor—Clarence Wedge—Prohibition.	
Lieutenant governor—	
Secretary of state—Albert Berg—Republican.	
Secretary of state—Julius J. Heinrich—Democrat—People's.	
Secretary of state—J. A. McConkey—Prohibition.	
Secretary of state—	

Vote for nine.

Vote for one.

Vote for one.

Vote for one.

Vote for one. Vote for one.

43 State treasurer—August T. Koerner—Republican.	
State treasurer—Alexander McKinnon—Democrat—People's.	
State treasurer—	
Attorney general—Henry W. Childs—Republican.	
Attorney general—John A. Keys—People's—Democrat.	
Attorney general—	
For taxation of railroad lands. YES. NO.	
For the act appropriating the income from internal improvement land fund to the internal improvement or road and bridge fund. YES. NO.	
Shall there be a constitutional convention? YES. NO.	
Amendment to section four (4) of article five (5) of the constitution of the State of Minnesota, defining the authority and duties of the governor in relation to pardons, and creating a board of pardons. YES. NO.	
Amendment to section one (1) of article seven (7) of the constitution of the State of Minnesota, which relates to elective franchises. YES. NO.	
Amendment to article four (4) of the constitution, allowing cities and villages in this State to frame their own city charters. YES. NO.	
Amendment to section thirteen (13) of article one (1) of the constitution, relating to the taking or damaging private property for public use. YES. NO.	
Amendment of article eight (8) of the constitution, providing for loaning the permanent school and university fund to cities, villages, towns, counties, and school districts. YES. NO.	
Constitutional amendment providing for the taxation of sleeping car and other companies and owners, etc. YES. NO.	

44 STATE OF MINNESOTA, }
County of Aitkin. }

District Court, Fifteenth Judicial Dist.

STATE OF MINNESOTA on Relation of JAMES N. MARR, Plaintiff, }
vs. }
FRED STEARNS, as County Auditor of Aitkin County, Minn., Defendant. }

Findings.

This case came on to be heard before the court in vacation by consent of parties and was submitted to the court for its determination on the twenty-fourth and twenty-fifth days of September, A. D. 1897, upon the evidence, H. W. Childs and A. Y. Merrill, Esqs., appearing for the relator, and M. D. Grover, Moses E. Clapp and Emerson Hadley, Esqs., appearing for the defendant.

Now after due consideration of the allegations and proofs of the respective parties and the court being duly advised in the premises, the court finds the following facts:

I.

That the defendant, Fred Stearns, on the third day of August, A. D. 1897, and for more than two years last past has been the county auditor of the county of Aitkin, in said State.

That the relator, James N. Marr, is now and for more than eight years last past has been a resident, citizen, freeholder and tax-payer in the said county.

45 That the lands described in the alternative writ of mandamus in said action are all and several thereof situate in the county of Aitkin.

II.

That the north half of section 35, township 47, range 27, of the said lands is now and for several years last past has been the property of the St. Paul and Duluth Railroad Company.

That the St. Paul and Duluth Railroad Company is now and has been since June, 1877, a corporation duly created by, and duly existing under, the laws of the Territory and State of Minnesota, and especially by and under an act of the legislature of the Territory of Minnesota, entitled, "A bill for an act entitled An act to incorporate the Nebraska and Lake Superior Railroad Company," approved May 23, 1857; and an act of the legislature of the State of Minnesota, entitled "An act to amend an act entitled 'An act to incorporate the Nebraska and Lake Superior Railroad Company,'" approved March 8, 1861; and an act of the legislature of the State of Minnesota, entitled, "An act to extend the time for the grading and completion of the Lake Superior and Mississippi railroad," approved March 6, 1863, and an act of the legislature of the State of Minnesota entitled, "An act to execute the trust created by an act of Congress, entitled, 'An act making a grant of lands to the

State of Minnesota, to aid in the construction of the railroad from St. Paul to Lake Superior,' approved May 5, 1864, and to grant the said lands to the Lake Superior and Mississippi
46 Railroad Company to aid in the construction of its railroad and to amend and continue certain acts in relation to said railroad company," approved February 23, 1865; and an act of the legislature of the State of Minnesota, entitled, "An act in relation to the deposit of $20,000 by the Lake Superior and Mississippi Railroad Company, provided for in chapter 2 of the Special Laws of 1865, and to amend said special act," approved February 26, 1868; and an act of the legislature of the State of Minnesota, entitled, "An act extending the time for the completion of the Lake Superior and Mississippi railroad," approved March 9, 1867; and an act of the legislature of the State of Minnesota entitled "An act relating to the Lake Superior and Mississippi Railroad Company," approved March 5, 1870; and an act of the legislature of the State of Minnesota, approved March 6, 1876, and entitled "An act to amend title 1 of chapter 34 of the General Statutes relating to corporations," this last-mentioned act appearing also, in part, as section 87, of chapter 34 of title 1, of the General Statutes of Minnesota of 1878; that said above mentioned act, approved May 23, 1857, was duly accepted by the persons therein named, and the Nebraska and Lake Superior Railroad Company, and such acceptance of said act was duly filed in the office of the secretary of state of Minnesota on September 12, 1857; that said above-mentioned act, approved March 8, 1861, was duly accepted by the persons therein named and by the Nebraska and Lake Superior Railroad Company, and by the Lake Superior and Mississippi Railroad Company, and such acceptance of said act was duly filed in the office of the secretary of state
47 of Minnesota on April 13, 1861; that said above-mentioned act, approved March 6, 1863, was duly accepted by the Lake Superior and Mississippi Railroad Company, and such acceptance thereof was duly filed in the office of the secretary of state of Minnesota on March 7, 1863; that said above-mentioned act approved February 23, 1865, was duly accepted by the Lake Superior and Mississippi Railroad Company, and such acceptance thereof was duly filed in the office of the secretary of state of Minnesota on February 25, 1865; and that each and all of the foregoing acts of the Territory and State are hereby referred to for greater certainty, and are made a part hereof.

That pursuant to, and in accordance with, authority so to do, conferred upon it by the aforesaid several acts of the legislature of the Territory and State of Minnesota, the Lake Superior and Mississippi Railroad Company, a corporation duly created by and existing under the several acts, except that approved March 6, 1876, referred to in the preceding paragraph, did, on or about January 1, 1869, make, execute and deliver a certain mortgage and trust deed to J. Edgar Thompson and William G. Moorhead, as trustees thereunder, wherein and whereby said Lake Superior and Mississippi Railroad Company conveyed and mortgaged to said trustees, all the line of said road of said company and all of its franchises (including its franchise

to be a corporation) and all property of every kind and description, whether already acquired, to be acquired or thereafter obtained, for the purpose of securing certain bonds of said company, amounting in the aggregate to $4,500,000, which bonds said Lake
48 Superior and Mississippi Railroad Company, for a valuable consideration, made, issued and negotiated at the same time and by which it covenanted and agreed with the several holders of said bonds to pay the principal of said bonds to their holders, at a time in them named, and further to pay interest on the principal of said bonds, to their holders, semi-annually at the rate of seven (7) per cent. per annum, on the first day of January and July of each year; that in and by said bonds, said Lake Superior and Mississippi Railroad Company, also covenanted and agreed among other things, that if at any time said company should be in default in the payment of any interest upon any of said bonds, and said default should continue sixty (60) days after the maturity and demand of payment of said interest, that thereupon the principal of such bonds should become due and payable forthwith; and said Lake Superior and Mississippi Railroad Company further covenanted and agreed, by said bonds and mortgage and trust deed with the holders of said bonds and the trustees in said mortgage and trust deed, that in case of any default of said company, in paying, either any part of the principal of any of said bonds or of the interest thereon, as by said bonds required, and at the times in them named for such payment, then the trustees under said mortgage and trust deed might and should have the right to forthwith foreclose said mortgage and trust deed; that after the making, as aforesaid, of said bonds and mortgage and trust deed, George Philler and Stephen A. Caldwell were duly, and in accordance with the terms and requirements of said bonds and
49 trust deed and mortgage, and as permitted thereby, substituted as trustees in the place and stead of said Thompson and Moorhead; that thereafter and on or before January 1, 1874, the Lake Superior and Mississippi Railroad Company failed and refused to pay the interest on any of said bonds, though payment of such interest had been duly demanded of said company by the holders of said bonds, and was then due, and on or before January 1, 1874, said Lake Superior and Mississippi Railroad Company became and was in default in the payment of the principal and interest of its said bonds; that upon said default in the payment of interest on said bonds, and after said default had continued more than sixty days from the maturity and demand of payment of said interest, the holders of said bonds elected, as by said bonds and trust deed and mortgage they were in such case expressly permitted to do, to declare and they did declare, on or before January 1, 1875, the principal of all said bonds forthwith due and payable; that thereafter and while said Lake Superior and Mississippi Railroad Company was in default in the payment of both the principal and interest of its said bonds, and after it had so been in default over six months, the said Philler and Caldwell, trustees under said mortgage and trust deed, the conditions of said bonds and trust deed and mort-

gage having become broken and foreclosure of said trust deed and mortgage being then authorized according to its terms, began a suit in equity against said Lake Superior and Mississippi Railroad Company and others, in the circuit court of
50 the United States, in and for the district of Minnesota, to foreclose said trust deed and mortgage; that said circuit court duly obtained and had jurisdiction of said action and of said company and of all the parties to said suit; that in said suit such proceedings were duly had thereafter; that on or about March 8, 1877, said circuit court, by its decree then duly rendered, ordered, adjudged and decreed that said trust deed and mortgage were a valid and existing lien, prior and superior to any other lien or right whatever, upon all the corporate and other franchises and immunities of said corporation and its rights and privileges as such, and all its property, including its franchises to be a corporation. And that there was then due and unpaid upon said bonds and mortgage and trust deed, the sum of $5,771,260.55, secured by such first lien, and further ordered, adjudged and decreed that unless the whole of said sum were paid by said Lake Superior and Mississippi Railroad Company, to the said trustees, within thirty (30) days from the said rendition of said decree, then all of said property, franchises, rights and immunities, should be sold at public auction by or under the direction of H. E. Mann, Esq., a master of said circuit court, in one parcel, and as an entire property, to the highest and best bidder therefor, and that the right and equity of redemption of said Lake Superior and Mississippi Railroad Company, and of all others, should be absolutely foreclosed and barred by such sale, in pursuance of said order, and that said sale of all said property should be absolute and without any right of redemption whatever, by any one; that upon payment of the sum bid at such sale by the highest and best bidder and confirma-
51 tion of said sale by said circuit court, the said master should execute and deliver a deed, in accordance with said decree, to the purchaser thereof; that thereafter the said Lake Superior and Mississippi Railroad Company, having neither paid, nor caused to be paid, to said trustees, as or when permitted by said decree or at any time, any part of the sum by it found and adjudged to be due and payable as aforesaid, and the said thirty (30) days from the entry and rendition of said decree, having expired, and further proceedings were had in said suit, in said circuit court, that said H. E. Mann, Esq., master of said court, in pursuance of and in full compliance with said decree, and according to the course and practice of said court, and after performing and attending to all the preliminaries and prerequisites required by said decree or practice, did, on May 1, 1877, sell at public auction, and as one entire property, all the said franchises, rights, immunities and properties of said Lake Superior and Mississippi Railroad Company, to William H. Rhawn, Edwin M. Lewis, George Whitney, Nathan Hilles, Frederick R. Shelton, Edward A. Rollins and Fisher A. Baker, for the sum of $500,000, that sum being the largest amount bid, and the said persons last named being the highest bidders for said fran-

chises, rights, immunities and property; that said sale was authorized by said decree; that the said purchasers at said sale, in all respects complied with the requirements and conditions of said decree and sale and their purchase, and fully performed everything of them in any way required, and that thereafter, the said sale and proceedings
52 having been duly reported to said circuit court, that court, on June 12, 1877, duly confirmed and approved said sale, ordered said master to make and deliver to said purchasers a deed of all said franchises, rights, immunities and property; that thereafter and on June 14, 1877, said master, in pursuance of and in all respects as authorized by and in accordance with said decree, sale and confirmation, made, executed and delivered to said purchasers and their heirs, successors and assigns, a deed, in accordance with the terms of said decree, wherein and whereby there were granted and conveyed to said purchasers, to wit: William H. Rhawn, Edwin M. Lewis, George Whitney, Nathaniel Hilles, Frederick R. Shelton, Edward A. Rollins and Fisher A. Baker, their heirs, personal representatives, successors and assigns, all of said franchises, rights, immunities and property; that said deed was duly filed and recorded in the office of the secretary of state of Minnesota on or about June 14, 1877, and is hereby referred to for greater certainty, as a part hereof; that by said foreclosure and sale, all of the franchises, rights, privileges, immunities and property of the Lake Superior and Mississippi Railroad Company were granted, transferred and conveyed to said purchasers, at said sale, their successors and assigns, and that said purchase was made by said purchasers for the use and benefit of the said bondholders of said Lake Superior Railroad Company, and in view of and as permitted by and with the purpose of reorganization and incorporation under and pursuant to an act of the legislature of the State of Minnesota, approved
53 March 6, 1876, and entitled, "An act to amend title 1, of chapter 34, of the General Statutes relating to corporations." That thereafter said purchasers and the persons for whose benefit said purchase has been made, as aforesaid, did, on or about June 27, 1877, organize and associate themselves as a corporation under and pursuant to and in full compliance with said last-mentioned act, approved March 6, 1876, and were at said date last named duly created, and have since duly existed as a corporation, under and pursuant to said last-mentioned act, under and by the name of the "Saint Paul and Duluth Railroad Company;" that all the steps required to be taken and things required to be done for incorporation under said act of March 6, 1876, were duly taken and done at the times, in the manner and by the persons by said act specified; that on June 27, 1877, the said purchasers met at St. Paul, Minnesota, said date being within thirty (30) days of the delivery of the deed to them from said master of the United States circuit court, as aforesaid, after notice of the time and exact place of such meeting had been published by said purchasers for at least ten days prior to the time of said meeting in some of the daily newspapers of St. Paul, and at said meeting said purchasers adopted the corporate name of "The St. Paul & Duluth Railroad Company" for the pro-

posed new organization, and elected a board of nine directors for said corporation, and said board thereupon elected a president, secretary, treasurer and such other officers as said Lake Superior and Mississippi Railroad Company had had and been authorized to elect,
54 and adopted a corporate seal for said St. Paul & Duluth Railroad Company; that thereafter, and on or about June 27, 1877, said St. Paul and Duluth Railroad Company made and certified, under its corporate seal, attested by its president and secretary, a statement showing the date of its said organization, the corporate name of it adopted, the amount of its capital stock, issued and unissued, common and preferred; the name of its president, secretary, treasurer and other general officers; the number and names of its directors chosen, as aforesaid, at said meeting; and did on said June 27, 1877, cause said statement and said conveyance of said master to said purchasers to be recorded in the office of the secretary of state of Minnesota; that said statement, or record as aforesaid, is hereby referred to for greater certainty as a part hereof; that thereafter, and on or about July 17, 1877, said purchasers, at the foreclosure sale aforesaid, for a valuable consideration, made, executed and delivered to the St. Paul and Duluth Railroad Company, a deed and conveyance wherein and whereby they then granted and conveyed to said last-named company, its successors and assigns, all of the corporate and other franchises, and all the rights, privileges, immunities and property, which they acquired under said master's deed and decree.

That by an act of Congress approved May 5, 1864, and entitled, "An act making a grant of lands to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior," the United States granted to the State of Minnesota, for the
55 purpose of aiding in the building of a line of railroad from the city of St. Paul to the head of Lake Superior, being the road authorized to be constructed by and referred to in the said several acts of the Territory and State of Minnesota hereinbefore referred to, every alternate section of public land of the United States designated by odd numbers to the amount of five alternate sections per mile on each side of the said railroad on the line thereof within the State of Minnesota, with the right, in case any lands were lost from the grant before the definite location of the line of road, to select indemnity lands therefor from the lands of the United States nearest to the line of sections granted as aforesaid, in alternate sections or parts thereof, within twenty (20) miles of said line of road; that said act of Congress approved May 5, 1864, is hereby referred to and made a part hereof; that thereafter by an act of Congress approved July 13, 1866, and entitled, "An act to amend an act making a grant of land to the State of Minnesota to aid in the construction of the railroad from St. Paul to Lake Superior, approved May 5, 1864," it was provided and enacted that in case it should appear when the line of the Lake Superior and Mississippi railroad had been definitely located that the quantity of land intended to be granted by the said act approved May 5, 1864, in aid of the construction of said road should be deficient by reason of the

line thereof running near the boundary line of the State of Minnesota, the said company should be entitled to take from other public lands of the United States within thirty (30) miles of the west line of
56 said road such an amount of lands as should make up such deficiency, provided only, that such lands so taken should be in alternate odd-numbered sections; that — the act of the legislature of the State of Minnesota approved February 23, 1865, and hereinbefore referred to in a preceding paragraph, the State of Minnesota accepted the said acts of Congress and the grants of land thereby made; and, further, by said last-mentioned act of the legislature of the State of Minnesota, said grants of Congress and the lands thereby granted, were, by said State of Minnesota, granted and transferred to and vested in the Lake Superior and Mississippi Railroad Company, its successors and assigns, to aid in the construction of its line of road; that by said acts of the legislature of the State of Minnesota approved March 8, 1861, and hereinbefore referred to, the State of Minnesota granted to the Lake Superior and Mississippi Railroad Company in aid of the construction of its line of road, all the swamp lands for seven (7) miles on either side of said line of road, with the further right that if it should be found that any portion of said swamp lands had been sold or otherwise disposed of within the said seven (7) miles, the amount of said swamp lands granted to said company should be made up of other swamp lands belonging to said State of Minnesota outside of said seven (7) miles; and with the right, further, that if it should be found that within said seven (7) miles on each side of said company's line of road, there should not be an amount of swamp lands belonging to the State of Minnesota, to at least seven (7) full sections per mile, then the said company should have the right to select from the swamp lands
57 belonging to the State of Minnesota outside of said line and between the Mississippi river, Lake Superior and Rainy lake, other lands in an amount in all equal to seven (7) full sections for each and every mile of said road; that said last-mentioned act of the legislature of the State of Minnesota, was duly accepted by said Lake Superior and Mississippi Railroad Company and its said acceptance thereof was duly filed in the office of the secretary of state of Minnesota on April 13, 1861; that afterward by the act of the legislature of the State of Minnesota, approved March 6, 1863, hereinbefore referred to, said swamp-land grant by the State of Minnesota to the said Lake Superior and Mississippi Railroad Company was amended as shown by the provisions of said last-mentioned act; and that said last-mentioned act was duly accepted by said Lake Superior and Mississippi Railroad Company, and its acceptance thereof was duly filed in the office of the secretary of state of Minnesota on March 7, 1863; that the line of road of Lake Superior and Mississippi Railroad Company authorized by and referred to in the said several acts of the legislature of the Territory and of the State of Minnesota, hereinbefore referred to, and referred to in the said several acts of Congress hereinbefore referred to, and in aid of which the grants of lands were made as aforesaid by the United States and the State of Minnesota, was surveyed, located, constructed

and completed, long prior to the commencement of this action and within the time and in the manner specified and required by the said several acts of the Territory and State of Minnesota and of
58 Congress, and that the said Lake Superior and Mississippi Railroad Company and the St. Paul and Duluth Railroad Company, as its successor, in all respects complied with and conformed to the several acts of Congress and of the Territory and State of Minnesota hereinbefore referred to, and so complied with and conformed to said several acts within the times by said acts allowed therefor, and that said Lake Superior and Mississippi Railroad Company and its successor, the St. Paul and Duluth Railroad Company, in all respects and in proper season complied with and conformed to the provisions, conditions and requirements of the several acts of Congress and of the State of Minnesota granting lands to aid in the building of the said line of road of said Lake Superior and Mississippi Railroad Company, and that by the survey, location, construction and completion of the said line of road as aforesaid, said Lake Superior and Mississippi Railroad Company and the said St. Paul and Duluth Railroad Company, became entitled to the lands granted by the said acts of Congress and of the State of Minnesota hereinbefore referred to for the purpose of aiding in the building of said line of road; that under and in pursuance of the acts of Congress hereinbefore referred to and of an act of Congress approved March 3, 1865, and entitled, "An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," and of an act of Congress approved July 13, 1866, and entitled "An act relating to lands granted to the State of Minnesota to aid in constructing railroads," and of the acts of Con-
59 gress granting swamp lands to the State of Minnesota, the United States duly granted, certified and conveyed to the State of Minnesota several tracts of land in the county of Aitkin, Minnesota; that the said tract of land hereinbefore particularly described, and one of the parcels described in the alternative writ of mandamus herein, to wit, the north half of section 35, of town 47, range 27, in Aitkin county, Minnesota, is one of the said parcels of lands conveyed to the State of Minnesota by the United States pursuant to the acts of Congress granting swamp lands to said State; and thereafter, on the eighteenth day of August, 1883, said State of Minnesota duly granted and conveyed said tract of land to the St. Paul and Duluth Railroad Company, as the successor of the Lake Superior and Mississippi Railroad Company, pursuant to said acts above referred to, and the said St. Paul and Duluth Railroad Company has ever since said time held and owned, and now holds and owns, said tract of land made to the Lake Superior and Mississippi Railroad Company, and to the St. Paul and Duluth Railroad Company, its successor, as aforesaid, by the several acts of Congress and the Territory and State of Minnesota, hereinbefore referred to, to aid in the construction of the line of road of the Lake Superior and Mississippi Railroad Company, and the St. Paul and Duluth Railroad Company, its successor, as aforesaid.

That both the Lake Superior and Mississippi Railroad Company and the St. Paul and Duluth Railroad Company have annually paid to the State of Minnesota, and as required and within
60 the time specified by an act of the legislature and the State of Minnesota, approved March 3, 1865, and entitled "An act in relation to the taxation of lands granted to the Lake Superior and Mississippi Railroad Company," the proper gross-earnings tax fixed by said act.

That neither the Lake Superior and Mississippi Railroad Company nor its successor the St. Paul and Duluth Railroad Company, ever has sold or conveyed any portion of the lands hereinbefore particularly referred to as the north half of section 35, township 47, range 27, except as said land was sold, transferred and conveyed as aforesaid from the former to the latter company, and that neither the Lake Superior and Mississippi Railroad Company nor the St. Paul and Duluth Railroad Company has ever leased or contracted to sell, convey or lease any of said land; that said land is in Aitkin county, Minnesota, is not on the assessment-roll or tax-list and has never been, and is not taxed except and unless through taxation on the gross earnings of the railroad as provided by law; that the St. Paul and Duluth Railroad Company owns the same, and that it is not sold or contracted to be sold, and that the said company has owned the same for over five years; that the said land is not used or necessary to be used in connection with the operation of the railroad, but that the preferred stock of the St. Paul and Duluth Railroad Company, amounting approximately to about $5,000,000, is payable and redeemable out of the proceeds of the land grant and the land grant has been used solely and exclusively for the
61 purpose of raising funds with which to construct, equip, maintain and operate said railroad.

III.

That the piece or parcel of land described in the alternative writ of mandamus in said action, to wit, the northwest quarter of section 7, of town 47, range 27, in Aitkin county, Minnesota, is the property of the Northern Pacific Railroad Company; that the Northern Pacific Railroad Company is a corporation created by the act of Congress approved July 2, 1864, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route;" that it was authorized to construct its road and exercise its corporate franchises in the State of Minnesota by an act of the legislature of the State of Minnesota, approved March 2, 1865, entitled "An act to aid in the construction of the Northern Pacific railroad and telegraph lines from Lake Superior to Puget sound;" that said act of Congress above referred to (section 3) granted ten alternate sections of public land on each side of the line through the State of Minnesota to aid in the construction of said road; that said piece of land above described, to wit, the said northwest quarter of section seven, was granted, certified and conveyed by the United States to the

Northern Pacific Railroad Company pursuant to said act of Congress above referred to, and the Northern Pacific Railroad Company now owns and holds the same, and for several years last past has owned and held the same, by title in fee-simple absolute as a part of
62 the lands granted to it as aforesaid; that the said Northern Pacific Railroad Company has never contracted to sell, or leased or conveyed the same, or any part thereof.

That the percentage of the gross earnings of said railroad provided to be paid by an act of the legislature of the State of Minnesota, approved March 4, 1870, and entitled "An act in relation to the taxation and to facilitate the construction of the Northern Pacific railroad," being chapter 65 of the Special Laws of Minnesota of the Year 1870, has been duly paid to the treasurer of the State of Minnesota each year, as provided for in said act.

IV.

That the Minneapolis and St. Cloud Railroad Company, now by change of name, the Great Northern Railway Company, is now a railway corporation, organized under the laws of this State and operating a railroad therein. That by an act of the legislature of the State, approved February 11, 1865, lands were granted by said State to the Minneapolis & St. Cloud Railroad Company to aid in the construction of its line of railway, and under said act and acts amendatory thereof and supplemental thereto, northwest one-quarter of the southwest one-quarter of section 14, township 47, range 27, was conveyed by the State to the Great Northern Railway Company as a parcel of the lands granted to the Minneapolis & St. Cloud Railroad Company to aid in the construction of its line of railway; and that the said Great Northern Railway Company is now the owner thereof; that the said Great Northern Railway Company has not accepted chapter 111 of the Special Laws of Minnesota for the Year 1873.

63 That three per cent. of the gross earnings of the line of railway operated by the Great Northern Railway Company and of the line constructed and operated under its charter has been paid each year to the State, at the time and in the manner provided in the act of the legislature of said State, entitled "An act for the taxation of railroad companies," approved March 7, 1887.

V.

That no part of any of the lands described in the petition herein are held, used or occupied for right of way, gravel pits, side tracks, depots or for any buildings or structures which are necessarily used in the actual management and operation of any of said railroad companies.

VI.

That during the session of the legislature of the State commencing in January, 1895, being the twenty-ninth session of such legislature, there was introduced into the house of representatives, one of the branches of said legislature, a bill for an act entitled "An act

relating to the taxation of certain lands owned by railroad companies in this State, and repealing laws and parts of laws relating to the taxation of the same, and to provide for the submission of this act to the people of this State for their approval or rejection," of which said bill chapter 168 of the General Laws of 1895 of said State is a copy; that said bill was declared passed by the house of representatives and was by said house transmitted to the senate on the ninth day of February, 1895; that it
64 appears upon the journal of the senate and that it was received in the senate, referred to a committee and put upon its final passage the thirteenth day of March, 1895, and that the roll of the senate and its yeas and nays being called upon the final passage of the bill, there were twenty-eight votes in its favor and no more; and that among those voting yea, or in favor of the passage of the bill, was Frank A. Day; that said Day was an acting and a *de facto* senator on said last-named day of said session of the legislature, and that said bill was thereafter signed by said Frank A. Day as president of the senate and transmitted to the governor and that it received his approval on the nineteenth day of March, 1895.

VII.

That at the general State election held in November, 1896, in said State, a ballot was prepared by the secretary of state and used by the electors of the State, a copy whereof is attached to the defendant's answer and made a part thereof and marked Exhibit "A;" that said house file No. 1, being chapter 168 of the General Laws of 1895, was not attached to said ballot or referred to therein in terms or by reference to title or otherwise, save as indicated by the words printed thereon.

The court finds as conclusions of law that the relator is entitled to the relief prayed for, with costs.

Let judgment be entered accordingly.

By the court:

G. W. HOLLAND,
District Judge.

Dated October 29, 1897.

65 STATE OF MINNESOTA, }
County of Aitkin. }

District Court, Fifteenth Judicial Dist.

STATE OF MINNESOTA on Relation of JAMES N. MARR, Plaintiff, }
vs.
FRED STEARNS, as County Auditor of Aitkin County, Minn., Defendant. }

Judgment.

This action having duly come on to be heard at a special term of the above-named court, duly held at the city of Brainerd, on the twenty-fourth day of September, 1897, and having been duly tried

before the court, H. W. Childs, Esq., and A. Y. Merrill, Esq., appearing for the relator, and M. D. Grover, Esq., Moses E. Clapp, Esq., and Emerson Hadley, Esq., appearing for the respondent, and the court having heard and considered all the evidence adduced in said action, and the arguments of counsel, and did duly make and file its order and findings therein:

Now, therefore, on the motion of H. W. Childs, Esq., A. Y. Merrill, Esq., as attorneys for the relator, and by direction of the court in said order contained, it is adjudged that the alternative writ of mandamus heretofore issued herein be, and the same is hereby made, peremptory, and the said respondent is hereby adjudged and commanded to immediately do and perform all things as in
66 said alternative writ commanded and enjoined, and that he forthwith place upon the tax-list of the county of Aitkin, for taxation, the said tracts and parcels of land, and all thereof, referred to in said alternative writ.

It is further ordered, adjudged and decreed that a peremptory writ of mandamus do forthwith issue out of and under the seal of this court, directed to said respondent, and commanding him to immediately and forthwith do and perform all things commanded and enjoined in said alternative writ, and to place upon the tax-list of Aitkin county for taxation the said tracts and parcels of land, and all thereof, as referred to in said alternative writ.

By the court:

[SEAL.] FRANK E. SEAVEY, *Clerk.*

Dated December 16, 1897.

STATE OF MINNESOTA, }
County of Aitkin. }

District Court, Fifteenth Judicial Dist.

STATE OF MINNESOTA on Relation of JAMES N. MARR, Plaintiff, }
vs.
FRED STEARNS, as County Auditor of Aitkin County, Minn., Defendant. }

Settled Case.

The above-entitled action came duly on to be heard before
67 the court, in vacation, by consent of parties, and was submitted to the court for its determination on the twenty-fourth and twenty-fifth days of September, A. D. 1897, H. W. Childs and A. Y. Merrill, Esqs., appearing for the relator, and M. D. Grover, Moses E. Clapp and Emerson Hadley, Esqs., appearing for the defendant.

The following is a record of the proceedings had at said time upon the presentation of said matter to said court:

It was admitted by the parties that the journals of the legislature for the sessions of 1895 and 1897 might be referred to by either party as to any fact therein appearing, and that all recitals therein

contained touching the official conduct of Frank A. Day shall be treated as if pleaded by either party and in evidence.

That, pursuant to this stipulation, the defendant called the attention of the court to the following extracts from the journal of the senate of the twenty-ninth session, and they were received in evidence, to wit, on page 3 of said journal, as follows:

"First day.—St. Paul, Tuesday, January 8, 1895.—This day being designated by the statute for the assembling of the legislature of the State of Minnesota, the members of the senate assembled in the senate chamber of the capitol and were duly called to order by Lieut. Gov. D. M. Clough at 12 m.

Senator Day was appointed temporary secretary.

The secretary called the roll and the following-named senators answered to their names:

Messrs. Allen, Barr, Cole, Collester, Cronkhite, Culkin,
68 Currier, Day, Dunham, French, Fuller, Greer, Hanna, Hanson, Heneman, Hodge, Howard, Iltis, Jones, Johnson, A. G., Johnson, W. E., Keller, Knatvold, Larson, Lloyd, Masterman, Miller, Morgan, McArthur, McHale, Ozmun, Peterson, Potter, Pottgieser, Reishus, Ringdal, Roverud, Schaller, Sevatson, Sheehan, Smith, Spencer, Sperry, Stebbins, Stevens, Stockton, Sweningson, Theden, Thompson, Thorpe, Wing, Wyman, Yale, Young.

The senators-elect then came forward, presented their certificates of election, and subscribed to and took the oath of office.

The senate then proceeded to the election of officers."

On pages 58 and 59 of said journal, being the journal for the thirteenth day of the session, Friday, January 25, 1895, as follows:

"Mr. French moved—

That the senate proceed to elect a president *pro tem.*

Which motion prevailed.

Mr. Stevens nominated Mr. Frank A. Day.

Mr. Howard nominated Mr. Geo. T. Barr.

Mr. Stevens moved—

That the vote be taken by calling the roll, each senator voting *viva voce* as his name was called.

Which motion prevailed.

A call of the senate was then taken to ascertain how many were present.

The roll being called the following senators answered to their names:

Messrs. Allen, Barr, Collester, Cronkhite, Culkin, Currier, Day,
French, Fuller, Greer, Hanna, Hanson, Heneman, Hodge,
69 Howard, Iltis, Jones, Johnson, A. G., Johnson, W. E., Keller, Knatvold, Larson, Lloyd, Masterman, Miller, Morgan, McArthur, McHale, Ozmun, Peterson, Pottgieser, Reishus, Ringdahl, Roverud, Schaller, Sevatson, Sheehan Spencer, Sperry, Stebbins, Stevens, Sweningsen, Theden, Thompson, Thorpe, Wing, Wyman, Yale.

Messrs. Cole, Dunham, Smith, Stockton, and Young were absent.

And the roll being called on the election of a president *pro tem.*—

Those who voted for Mr. Barr were:

Messrs. Allen, Greer, Hanna, Howard, Johnson, W. E., Knatvold, Masterman, Peterson, Potter, Sperry, Theden, Wyman.

Those who voted for Mr. Day were:

Messrs. Collester, Cronkhite, Culkin, Currier, French, Fuller, Hanson, Heneman, Hodge, Iltis, Jones, Johnson, A. G., Keller, Larson, Lloyd, Miller, Morgan, McArthur, McHale, Ozmun, Pottgieser, Reichus, Ringdahl, Roverud, Schaller, Sevatson, Sheehan, Spencer, Stebbins, Stevens, Sweningsen, Thompson, Thorpe, Wing, Yale, Young.

Mr. Day voted for Mr. Stevens.

Mr. Barr was excused.

Mr. Barr received 12 votes.

Mr. Day received 36 votes.

Mr. Stevens received 1 vote.

Mr. Day, having received a majority of all the votes cast, was declared elected.

Mr. Barr moved—

That Mr. Day be declared unanimously elected.

Which motion prevailed.

70 On pages 80 and 81, of said journal, being the journal of the seventeenth day of the session, Thursday, January 31, 1895, as follows:

"The following communication was received from his excellency the governor:

ST. PAUL, MINN., *Jan.* 31, 1895.

Hon. D. M. Clough, lieutenant governor, State of Minnesota.

DEAR SIR: Having been elected United States Senator from this State for the term of six years, commencing March 4, 1895, I hereby resign the office of governor of said State, such resignation to take effect forthwith.

Yours truly, KNUTE NELSON, *Governor.*

STATE OF MINNESOTA, EXECUTIVE DEPARTMENT,
ST. PAUL, *January* 31, 1895.

To the legislature of the State of Minnesota.

GENTLEMEN: Having, on the twenty-third day of January, 1895, been duly elected by you, United States Senator for the term of six years, commencing March 4, 1895, I have this day resigned the office of governor of the State of Minnesota, and have placed my letter of resignation in the hands of Lieutenant Governor D. M. Clough.

Yours respectfully, KNUTE NELSON, *Governor.*

The retiring lieutenant governor then briefly addressed the senate, thanking the senators for past courtesies.

President of the senate, Mr. Day, was then called to the chair.

71 Mr. Yale offered the following resolution:

Resolved, That the senate take a recess for thirty minutes to allow the members of this body to welcome our new governor,

and bidding farewell to our retiring governor, whom this legislature has elected to the high office of United States Senator.

Which was adopted."

On page 89 of said journal, being the journal of the seventeenth day of the session, Thursday, January 31, 1895, as follows:

"Upon reassembling, the following communication was received from his excellency, the governor:

STATE OF MINNESOTA, EXECUTIVE DEPARTMENT,
ST. PAUL, *January* 31, 1895.

To the legislature of the State of Minnesota.

GENTLEMEN: Knute Nelson, having this day resigned the office of governor of this State, I have, in pursuance of the constitution, duly assumed the office of governor and duly qualified for said office.

Very respectfully, D. M. CLOUGH, *Governor.*

President Day announced his resignation from the committee on railroads in favor of Mr. Stockton, and from the committee on mines and mining in favor of Mr. Jones."

On page 390 of said journal, being the journal of the forty-sixth day of the session, Wednesday, March 13, 1895, as follows:

"H. F. No. 1. A bill for an act relating to the taxation of certain lands owned by certain railroad companies in this State, and
72 repealing laws and parts of laws relating to the taxation of the same, and to provide for the submission of this act to the people of this State for their approval or rejection—

Was read the third time and put upon its final passage.

The question being taken on the passage of the bill.

And the roll being called, there were yeas 28 and nays 22, as follows:

Those who voted in the affirmative were:

Messrs. Allen, Barr, Cole, Culkin, Day, Hanna, Hanson, Heneman, Hodge, Iltis, Jones, Johnson, A. G., Knatvold, Larson, Miller, Ozmun, Peterson, Reishus, Ringdal, Sevatson, Sheehan, Smith, Theden, Thompson, Thorpe, Wing, Wyman, Young.

Those who voted in the negative were:

Messrs. Collester, Currier, Dunham, French, Fuller, Greer, Howard, Johnson W. E., Lloyd, Masterman, Morgan, McArthur, McHale, Potter, Pottgieser, Roverud, Schaller, Spencer, Stebbins, Stevens, Stockton, Sweningsen.

So the bill passed and its title was agreed to.

Mr. McHale raised the point of order that—

H. F. No. 1 was not carried, inasmuch as the bill had but 28 votes, including that of the lieutenant governor, and that without his vote it had but 27 votes.

Mr. Allen moved to reconsider the vote by which house file No. 1 was passed.

The question being taken on the motion to reconsider,

And the roll being called, there were yeas 1 and nays 38, as follows:

Mr. Hale voted in the affirmative.

Those who voted in the negative were:

73 Messrs. Allen, Barr, Cole, Collester, Culkin, Currier, Day, French, Fuller, Hanna, Heneman, Hodge, Jones, Johnson A. G., Johnson W. E., Knatvold, Larson, Masterman, Miller, Morgan, McArthur, Ozmun, Peterson, Reishus, Ringdal, Sevatson, Sheehan, Smith, Spencer, Stevens, Sweningsen, Theden, Thompson, Thorpe, Wing, Wyman, Young.

So the motion was lost."

On pages 838 and 839 of said journal, being the journal of the seventy-ninth day of the session, April 23, 1895, as follows:

"The senate then proceeded to elect a president *pro tem.*

Mr. Morgan nominated Mr. George Barr.

Mr. Stevens seconded the nomination, and Mr. Barr was elected unanimously by a rising vote."

The relator further called attention of the court to the following extracts from the journal of the senate of the thirtieth session, and they were received in evidence, to wit:

On pages 3 and 4, being the journal of the first day of that session, January 5, 1897, as follows:

"This being the day designated by statute for the assembling of the legislature of the State of Minnesota, the members of the senate assembled in the senate chamber of the capitol and were duly called to order by Lieut. Gov. Gibbs at 12 m.

Mr. Potter was appointed temporary secretary.

Mr. Knatvold moved that we now proceed to organize under the statutes, and that the secretary call the roll of senators by

74 senatorial districts, when the following senators responded:

First district—E. K. Roverud.
Second district—R. E. Thompson.
Third district—Sam. Sweningsen.
Fourth district—T. V. Knatvold.
Fifth district—Geo. D. McArthur.
Sixth district—F. A. Day.
Seventh district—H. J. Miller.
Eighth district—E. Sevatson.
Ninth district—E. D. French.
Tenth district—Geo. T. Barr.
Eleventh district—Eugene B. Collester.
Twelfth district—W. A. Sperry.
Thirteenth district—Henry Currier.
Fourteenth district—A. T. Stebbins.
Fifteenth district—W. H. Yale.
Sixteenth district—E. S. Reishus.
Seventeenth district—John Peterson.
Eighteenth district—Charles J. Larsen.
Nineteenth district—J. W. Lloyd.
Twentieth district—A. W. Stockton.
Twenty-first district—O. J. Wing.

Twenty-second district—A. J. Greer.
Twenty-third district—W. C. Masterman.
Twenty-fourth district—Albert Schaller.
Twenty-fifth district—Timothy D. Sheehan.
Twenty-sixth district—Nicholas Pottgieser.
Twenty-seventh district—Edward H. Ozmun.
Twenty-eighth district—Hiram H. Stevens.
Twenty-ninth district—William E. Johnson.
Thirtieth district—James T. Wyman.
Thirty-first district—Edwin G. Potter.
Thirty-second district—Darius F. Morgan.
Thirty-third district—Gustave Theden.
75 Thirty-fourth district—Stephen B. Howard.
Thirty-fifth district—Dewitt C. Dunham.
Thirty-sixth district—Jas. McHale.
Thirty-seventh district—Fred Iltis.
Thirty-eighth district—Wm. E. Culkin.
Thirty-ninth district—Peter E. Hanson.
Fortieth district—H. J. Heneman.
Forty-first district—L. O. Thorpe.
Forty-second district—James Hanna.
Forty-third district—E. T. Young.
Forty-fourth district—F. A. Hodge.
Forty-fifth district—Henry Keller.
Forty-sixth district—W. M. Fuller.
Forty-seventh district—A. G. Johnson.
Forty-eighth district—A. B. Cole.
Forty-ninth district—E. J. Jones.
Fiftieth district—John H. Smith.
Fifty-first district—P. M. Ringdahl.
Fifty-second district—John Q. Cronkhite.
Fifty-fourth district—H. R. Spencer.
Mr. Hanson was excused.

When the sixth senatorial district was called, Mr. Day answered to his name, whereupon Mr. Dunn stepped forward and offered his credentials as senator from said district, and requested to be sworn in.

Mr. Yale objected, and moved that the credentials be referred to the committee on elections.

Which motion prevailed."

On pages 62, 63, 64, 65, 66, 67 and 68 of said journal, being the journal for the tenth day of said session, January 20, 1897, as follows:

Mr. Sperry, from the committee on elections, made the following report:

76 Your committee on elections, to whom was referred the question as to who is entitled to the seat of senator, at this session, from the sixth senatorial district, report as follows:

Counsel for the respective parties appeared before the committee, and there entered into a written stipulation of all the facts bearing

upon the right of the respective parties, which stipulation is hereto attached, marked "Exhibit A," and made a part of this report.

Your committee further report that counsel for the respective parties do not desire to argue the questions involved in this matter twice, and your committee believing it to be a matter of so great importance that every senator should have the fullest opportunity of informing himself as to the rights of the respective parties to this controversy.

They therefore submit the enclosed statement of facts as agreed upon by counsel, and make no report as to the law in said matter, and refer the whole matter back to the senate, and recommend that it be taken up and considered by the senate on Thursday, the twenty-first day of January, 1897, at 11 o'clock a. m., and that counsel for the respective parties be permitted to address the senate thereon.

W. A. SPERRY.
R. E. THOMPSON.
JOHN H. SMITH.
E. T. YOUNG.
WILLIAM H. YALE.

77 EXHIBIT "A."

The committee on elections of the senate met in session in the railroad committee room at 3 p. m., Friday afternoon, January 15, 1897.

Senator W. A. Sperry in the chair.

Hon. Robert Evans and A. Y. Merrill appearing for Frank A. Day, and Hon. Moses Clapp and Mr. Munn appearing for Mr. H. H. Dunn.

By Hon. W. A. SPERRY: I would suggest that the counsel make a statement as to what they expect to prove here this afternoon, so that the committee may have it.

By Mr. MUNN: Is there a copy of the proceedings of the first day of the session here?

Copy furnished by Mr. Evans.

Mr. MUNN: I will make a statement in regard to what we have agreed upon. Counsel have agreed upon many facts which are claimed to be material by the parties proposing them. Neither party admits the materiality of the facts as shown, but all objections as to the materiality or relevancy of the facts which either party may desire hereafter to take may be taken and urged or waived at any hearing of this question, either before this committee or before the committee of the senate as a whole.

Mr. Munn offers that portion of the Senate Journal of the Thirtieth Session, on page 2, being the first day thereof, and which reads as follows: "When the sixth senatorial district was called Mr. Day answered to his name, whereupon Mr. Dunn stepped forward and offered his credentials as senator from said district and requested to be sworn."

78 We also offer the certificate of H. H. Dunn, as senator-elect from the sixth senatorial district of this State. This certificate reads as follows:

"*Certificate of Election.*

STATE OF MINNESOTA, }
County of Martin. }

I, Edgar B. Shanks, county auditor of the county of Martin, and State of Minnesota, do hereby certify, that at a general election, held in said county and State, on the first Tuesday after the first Monday, being the third day of November, A. D. 1896, H. H. Dunn received the highest number of votes cast for the office of State senator for the sixth senatorial district, composed of the counties of Martin and Watonwan, in the State of Minnesota, and was thereupon duly elected to the said office as appears from the official election returns on file in my office.

Witness my hand and official seal at Fairmont, in said county, this twenty-seventh day of November, A. D. 1896.

EDGAR B. SHANKS,
County Auditor, Martin County.

To H. H. Dunn, Fairmont, Minn."

And attached thereto is the corporate or official seal.

By Mr. EVANS: It is understood that all of this testimony is subject to the same objections.

Paper marked as Dunn's "Exhibit B."

Mr. MUNN: On the back of this certificate is the following:

"STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

I, H. H. Dunn, do solemnly swear that I will support the Constitution of — United States and the constitution of the State
79 of Minnesota, and that I will faithfully execute and discharge the duties of the office of State senator from the sixth senatorial district in the State of Minnesota, according to law and the best of my ability and understanding."

(Signed) H. H. DUNN.

Subscribed and sworn to before me this fourth day of January, A. D. 1897.

G. L. HELM,
Deputy Clerk, Supreme Court.

Mr. MUNN: Mr. Evans, will you admit that this is the same certificate that Mr. Dunn presented on the first day of the thirtieth (30) session as that referred to in that portion of the journal which we have offered?

It is admitted that the certificate which has been offered in evi-

dence is the same certificate as that referred to in the journal of the thirtieth session, at the second page thereof, and the same certificate referred to in that portion of the senate journal which was offered in evidence by Mr. Dunn, being referred to therein as his credentials.

Mr. BULLET sworn as a witness on behalf of Mr. Dunn.

Examined by Mr. MUNN:

Q. Where do you reside?
A. Fairmont, county of Martin.
Q. How long have you been there?
A. That county has been my home for the last thirty years.
Q. Do you know Frank A. Day?
A. Yes, sir.
Q. How long have you known him?
A. Ever since he came into the county.
Q. Some years?
80 A. Twenty odd years.
Q. State whether or not you had a conversation with him shortly after he assumed to act as lieutenant governor?
A. Do you wish me to state the conversation?
Q. Did you have such a conversation?
A. I did.
Q. Will you give that conversation?
A. As nearly as I remember it was as follows: We first met in my office, and I congratulated him on the fact of his being lieutenant governor, and we had some little talk in reference to it. I asked him how it was, or whether he could hold the position of senator and lieutenant governor. I expressed my doubts as to his ability to do that. His answer was in substance this: That he didn't know about that. I said, "It seems to me that the moment you took the oath of office for lieutenant governor you ceased to be senator." His answer to that was that he had never filed it.
Q. Never filed what?
A. His oath.
By Mr. EVANS: He said that he had never filed his oath as lieutenant governor?
A. He had not filed it; no, sir.

Mr. MUNN: That is all that we have to offer, aside from the facts which we have prepared.
Mr. EVANS: We had in our prepared statement this clause: "Agreed that the facts be read."
Mr. Munn read as follows:
"That at the general election in the fall of 1894, Frank A.
81 Day was elected as senator from the sixth senatorial district of this State for the term of four years. On the eighth day of January, 1895, he qualified and entered upon the discharge of his duties as said senator, and on the twenty-fifth day of January, 1895, he was duly elected president *pro tempore* of the senate of Minnesota.

On the thirty-first day of January, 1895, Knute Nelson, who was then governor of the State of Minnesota, having theretofore been elected United States Senator for the State of Minnesota, resigned the office of governor of said State, and on the said thirty-first day of January, 1895, the said Clough, who was at and prior thereto the duly elected and qualified lieutenant governor of the State of Minnesota, duly qualified as governor of the State of Minnesota, and entered upon the discharge of his duties as governor of the State of Minnesota. That on said thirty-first day of January, 1895, said Frank A. Day took the chair, and thereafter and up to the time of the close of the twenty-ninth session of said senate, performed the duties of, and assumed to act as, lieutenant governor of the State of Minnesota."

Mr. EVANS: The agreement was that we should not preclude ourselves from drawing the legal conclusions from his acts (that is, that we should not preclude ourselves from drawing the conclusion, the legal proposition, that he was not, in fact, lieutenant governor.)

Reading resumed by Mr. Munn:

" On January 26, said Day signed the warrants for the salaries of the senators and senate employés as president *pro tempore* of
82 the senate. On February 6, 1895, and during the remainder of the session, Frank A. Day signed all the warrants for the salaries of the senators and employés of the senate as president of the senate, and from that time on, said Day signed all warrants as lieutenant governor, and drew the salary of lieutenant governor, receipting therefor as lieutenant governor. Said Day signed all bills passed by the legislature after January 31, 1895, as president of the senate, and not as president *pro tempore;* that on the twenty-third day of April, 1895, and before the senate adjourned, it unanimously elected Hon. Geo. T. Barr, then senator from the tenth senatorial district, president *pro tempore* of the senate.

That from the first day of the session, said Day took part in the debates, voted upon nearly all bills, resolutions and motions that came before the senate and discharged the duties of a senator in the legislature of the State, and from and after the thirty-first day of January, 1895, regularly upon the opening of each session of the senate, and upon every call of the house, and upon any vote upon any bill or resolution taken in the senate, the name of said Frank A. Day was called as one of the senators.

That said Day voted upon more than one hundred bills, or measures pending, and resolutions during that time. That he took part in the debates on many bills and motions, and in other respects performed the duties of a senator. That the senate never, at any time, declared the seat of senator from the sixth sena-
83 torial district of the State of Minnesota vacant, except so far as it may be claimed from the election of Geo. T. Barr, as president *pro tempore*, of the senate, as hereinbefore stated.

That three or four days prior to Oct. 13, 1896, a petition in form, as follows, to wit:

"To the county auditor of the county of Martin, of the State of Minnesota:

Whereas, a vacancy has occurred and now exists in the office of State senator for the sixth senatorial district, for the said State of Minnesota, we, the undersigned, duly qualified electors, residing within said district in said State, in accordance with the law of 1893, chapter 41, and the amendments thereof, do hereby nominate H. H. Dunn, residing at Fairmont, Minnesota, for the said office of State senator, in and for said district, to be voted for at the general election to be held on the third day of November, 1896, the party which said party so nominated represents is the Republican party," was duly circulated in said sixth district, to which petition 504 qualified electors of said sixth senatorial district are attached, which petition was duly verified by oath of the signers thereto, and the same was thereupon filed in the office of the county auditor of Martin county, on the seventeenth day of October, A. D. 1896, and a certified copy thereof duly filed in the office of the county auditor of Watonwan county on the same day.

That thereupon the name of said H. H. Dunn was placed upon the official ballot as the Republican nominee for the office of senator from the sixth senatorial district, and said Dunn received at
84 said election three thousand two hundred and eighty (3,280) votes out of a total of five thousand three hundred and eighty-two (5,382) votes cast, being a majority of 1,378 votes. That at said election the total votes cast for the President of the United States in said sixth senatorial district was 5,255 votes, of which the Republican nominee received 3,352 and the Democrat, 2,395; that at said election the total votes cast for governor of the State of Minnesota, in the said sixth senatorial district, was 5,332, of which the Republican nominee received 2,756, and the Democrat nominee 2,395. That prior to said election said Frank A. Day was nominated by the Democratic and People's party of the second congressional district for Congress, and accepted said nomination, and was a candidate for election to Congress from said second congressional district at said election; that at said election said Day received as said candidate from the counties of Martin and Watonwan, which comprise the sixth senatorial district, 2,309 votes, while the Republican nominee received from said counties 3,003 votes. That prior to said election, and within the time provided by law, certain members of the People's party and Democratic party of said sixth senatorial district circulated a petition for the nomination of F. S. Livermore for the office of senator from the sixth senatorial district in said State and procured the requisite number of names to be attached thereto and filed the said petition in the office of and with the auditor of Martin county, with the request that he check the same over and ascertain if it was all right, and if so, make a certified copy
85 thereof, to be filed with the county auditor of Watonwan county. That after the preparation of such certified copy, and before the same was filed in Watonwan county, the said petition was withdrawn from the office of said auditor of said Martin county.

Mr. EVANS: Mr. Munn, we want it understood in that connection that Mr. Dunn was the only candidate for the senate and the only party voted for.

It was agreed between the parties that Mr. Dunn was the only name placed on the ticket by nomination to be voted for.

Mr. MUNN: I think that is all we care to offer; we would like to reserve the right before the argument to introduce any evidence which may come up.

It is agreed and understood that if there are any facts which Mr. Dunn desires to submit to the committee, the same can be submitted prior or at the time of the argument, hereafter to be fixed, and that Mr. Day shall have the same right.

Mr. EVANS, for Mr. Day: I want to offer that part of the journal which refers to the attendance of Mr. Day on the senate, and the calling of his name on the roll. We wish to offer that part of the journal which shows any action by Mr. Day as a senator from the sixth senatorial district of the State during the twenty-ninth session, his recognition as such, his vote upon bills, and answering to the call of the roll; the fact that his name was always called, and all other facts contained in the journal which relates to his actions or recognition as a senator, and also anything in the journal that bears upon his action as lieutenant governor or as president *pro*
86 *tempore* of the senate; and further, for the purpose of showing that there was no objection made to his acting as a senator, except as is disclosed by the journal, page 390.

Also offer that part of the journal for the purpose of showing that Frank A. Day performed all the duties of senator precisely in the same manner as that performed by the other senators at the same time, and precisely as said Frank A. Day had done prior to the thirty-first day of January, 1895.

Also offer the journal of the thirtieth session of the senate for the purpose of showing the recognition of Frank A. Day and his actions in the senate during this session.

It is also agreed that at the general election of 1896 John L. Gibbs was elected lieutenant governor of the State of Minnesota, and thereafter, on the fourth day of January, 1897, qualified, and has ever since been acting as such.

The following facts are also agreed to:

The candidacy of said Dunn for said office of State senator was generally known and discussed throughout said district and speeches made for and in opposition thereto, and said official ballot, with Dunn's name printed thereon as candidate for the office of senator from said sixth district, was published in the various newspapers in said district from the time of his nomination down to the day of election. No writ of election was issued by the governor of the State to fill a vacancy in the sixth senatorial district. That prior to placing Mr. Dunn's name upon the official ballot the county auditor of Martin county, the senior county of the sixth sen-
87 atorial district, communicated with the attorney general, and was advised by that officer that the only prudent course to pursue was to place Mr. Dunn's name on the official ballot. That

prior to making up the ballot for Watonwan county the auditor of that county communicated with the attorney general, and was advised as was the auditor of Martin county, that the only prudent course to pursue was to place Mr. Dunn's name on the official ballot.

Mr. Yale moved that the subject-matter of the report be made the special order for tomorrow morning at 11 o'clock.

Mr. Stevens moved—

To amend by making the report the special order in committee of the whole tomorrow morning at 11 o'clock.

The amendment was adopted.

The motion was then adopted.

On page 82, being the journal for the eleventh day of said session, January 21, 1897, as follows:

"On motion of Mr. Stevens the senate resolved itself into committee of the whole.

Mr. Greer in the chair.

After some time spent therein the committee arose and reported that they had had under consideration the report of the committee on elections on the question as to who is entitled to the seat of senator from the sixth senatorial district.

On motion, the senate then took a recess till 2 o'clock this afternoon."

And on page 83, being journal of the afternoon session of the same day, as follows:

88 "The senate then resolved itself into committee of the whole for the further consideration of the special order, the report of the committee on elections on the question as to who is entitled to the seat of senator from the sixth senatorial district.

Mr. Greer in the chair."

And on page 84, being journal of the twelfth day of said session, January 22, 1897, as follows:

"The senate then resolved itself into committee of the whole, for the further consideration of the special order of yesterday. The report of the committee on elections on the questions as to who is entitled to the seat of senator from the sixth senatorial district.

Mr. Greer in the chair.

After some time spent therein, the committee arose and reported progress, and asked to sit again."

And on page 85, being the journal of afternoon session of same day, as follows:

"The senate resolved itself into committee of the whole for the further consideration of the special order, the report of the committee on elections, on the question as to who is entitled to the office of senator from the sixth senatorial district.

Mr. Greer in the chair.

After some time spent therein the committee rose and reported progress on the special order, and asked leave to sit again."

On page 86, being the journal of the thirtieth day of said session, January 23, 1897, as follows:

The senate resolved itself into committee of the whole, for
89 the further consideration of the special order; the report of the committee on elections, on the question as to who is entitled to the seat of senator from the sixth senatorial district.

Mr. Greer in the chair.

After some time spent therein the committee rose and reported progress, and asked leave to sit again.

And on pages 87 and 88, being the journal of the afternoon session of the same day, as follows:

"The senate then resolved itself into committee of the whole for the further consideration of the special order of this morning.

Mr. Greer in the chair.

After some time spent therein, the committee rose and repeated that they had had under consideration the special order, the report of the committee on elections on the question of who is entitled to the office of senator from the sixth senatorial district.

Which they report back with the recommendation that the following resolution be adopted:

Resolved, That when this committee arise it recommend to the senate that in its opinion the facts referred to in the report of the committee on elections, created a vacancy in the office of senator in the sixth senatorial district on the thirty-first day of January, 1895, which vacancy continued until the third day of November, 1896, and that H. H. Dunn was on the third day of November, 1896, duly elected to the office of senator from said district and is entitled to his seat as such senator.

Mr. Stevens moved—

90 To amend the report of the committee by the adoption of the following resolution:

Resolved, That by reason of the facts recited in the report of the committee on elections, Frank A. Day is not entitled to the seat of senator from the sixth senatorial district of this State.

Mr. Stevens then moved a call of the senate.

And the roll being called the following senators answered to their names:

Messrs. Barr, Cole, Collester, Cronkhite, Culkin, Currier, Dunham, French, Fuller, Greer, Hanna, Hanson, Heneman, Hodge, Howard, Iltis, Jones, Johnson, A. G., Johnson, W. E., Keller, Knatvold, Larson, Lloyd, Masterman, Miller, Morgan, McArthur, McHale, Ozmun, Peterson, Potter, Pottgieser, Reishus, Ringdal, Roverud, Schaller, Sevatson, Sheehan, Smith, Spencer, Sperry, Stebbins, Stevens, Stockton, Sweningsen, Theden, Thompson, Thorpe, Whitney, Wing, Wyman, Yale, Young.

On motion all further proceedings under the call were dispensed with.

The question being taken on the adoption of the amendment offered by Mr. Stevens,

And the roll being called there were yeas 2 and nays 46, as follows:

Those who voted in the affirmative were:

Messrs. Stevens, Stockton.

Those who voted in the negative were:

Messrs. Barr, Cole, Collester, Cronkhite, Culkin, Currier, Dunham, French, Fuller, Greer, Hanna, Hanson, Heneman, Hodge, Howard, Iltis, Jones, Johnson, A. G., Johnson, W. E., Keller, Knatvold, Larson, Lloyd, Masterman, Miller, McArthur, McHale, Ozmun,
91 Peterson, Potter, Pottgieser, Ringdal, Roverud, Sheehan, Smith, Spencer, Sperry, Stebbins, Sweningsen, Theden, Thompson, Whitney, Wing, Wyman, Yale, Young.

So the amendment was not adopted.

The question then recurred on the adoption of the report of the committee. A division of the resolution was called for, as follows:

Resolved, That when this committee arise it recommend to the senate that, in its opinion, the facts referred to in the report of the committee on elections created a vacan-y in the office of senator in the sixth senatorial district on the thirty-first day of January, 1895, which vacancy continued until the third day of November, 1896.

The question being taken on the adoption of the resolution as divided,

And the roll being called there were yeas 30 and nays 23, as follows:

Those who voted in the affirmative were:

Messrs. Barr, Cole, Collester, Currier, Dunham, French, Fuller, Greer, Hanson, Heneman, Iltis, Jones, Keller, Knatvold, Lloyd, McArthur, Ozmun, Peterson, Potter, Pottgieser, Roverud, Sheehan, Smith, Spencer, Sperry, Stebbins, Sweningsen, Thompson, Thorpe, Wing.

Those who voted in the negative were:

Messrs. Cronkhite, Culkin, Hanna, Hodge, Howard, Johnson, A. G., Johnson, W. E., Larson, Masterman, Miller, Morgan, McHale, Reishus, Ringdahl, Schaller, Sevatson, Stevens, Stockton, Theden, Whitney, Wyman, Yale, Young.

92 So the first part of the resolution was adopted.

The question then recurred upon the adoption of the second part of said resolution, as follows:

"And that H. H. Dunn, was, on the third day of November, 1896, duly elected to the office of senator from said district, and is entitled to his seat as such senator."

The question being taken on this portion of the resolution,

And the roll being called, there were yeas 30 and nays 23, as follows:

Those who voted in the affirmative were:

Messrs. Barr, Cole, Collester, Currier, Dunham, French, Fuller, Greer, Hanson, Heneman, Iltis, Jones, Johnson, W. E., Keller, Knatvold, Lloyd, McArthur, Ozmun, Peterson, Potter, Pottgieser, Roverud, Sheehan, Smith, Spencer, Sperry, Stebbins, Sweningsen, Thompson, Thorpe, Whitney, Wing.

Those who voted in the negative were:

Messrs. Cronkhite, Culkin, Hanna, Hodge, Howard, Johnson, A. G., Larson, Masterman, Miller, Morgan, McHale, Reishus, Ringdahl, Schaller, Sevatson, Stevens, Stockton, Theden, Wyman, Yale, Young.

So the resolution was adopted."

On page 89, being the journal for the fourteenth day of said session, January 26, 1897, as follows:

"Mr. H. H. Dunn then appeared and took the oath of office as senator from the sixth senatorial district.

The president announced that he had appointed Mr. Dunn
93 to all the places on committees made vacant by the unseating of Mr. Day.

Mr. Sheehan resigned as chairman of the committee to investigate the labor bureau.

The president appointed Mr. Dunn as chairman of said committee in place of Mr. Sheehan."

The attention of the court was called to the fact that it appeared at various places throughout the journal of senate of the twenty-ninth session of the legislature, all executive communications incorporated in the journal after January 31, 1895, are addressed "Frank A. Day, president of the senate," and that there was no other record of the final passage of house file number 1, in the journal except that on page 390, above quoted.

The attention of the court was called by the counsel for the relator to the fact that throughout the journal of the twenty-ninth session, it appears that whenever there was a roll-call of the senate, Mr. Day's name was called, and that Mr. Day frequently voted for or against questions before the senate.

Relator read in evidence and called the attention of the court to the following pages of the journal of the senate of the twenty-ninth session of the legislature to substantiate his claim that the said Day assumed the right and was permitted to vote upon pending bills as State senator for the sixth senatorial district during the said session, viz: Pages 120, 126, 134, 137, 138, 139, 140, 143, 147,
148, 149, 152, 153, 164, 168, 169, 171, 177, 178, 186, 188, 189, 195,
197, 202, 204, 224, 226, 232, 233, 251, 252, 260, 269, 270, 271,
94 276, 277, 277, 279, 280, 291, 292, 293, 294, 296, 312, 313, 315,
324, 325, 326, 328, 336, 341, 350, 352, 499, 500, 501, 503, 505,
509, 525, 529, 539, 543, 554, 559, 626, 631, 654, 707, 769, 779, 795,
799, 807, 819.

And to show, furthermore, that the said Day assumed the right and was permitted to act as State senator for the sixth district at the said session, relator read in evidence and called the attention of the court to the following pages of the said senate journal, viz:

1. To show that the said Day was summoned as and regarded a senator in calls of senate made upon motions of senators, the following pages were read: 262, 314, 342, 351, 771, 789.

2. To show that he was permitted, as senator, to present a motion in session, page 322 was read.

3. To show that he acted as a member of the committee of the senate on judiciary, page 320 was read.

4. To show that he was permitted to address the senate on a question of privilege, page 580 was read.

The relator admitted all of the allegations of subdivisions first, second, third and fourth of the answer except it did not admit that the acts therein referred to constitute a contract between the re-

spective railroad companies and the State and did not admit that said acts are not open to repeal.

It was further admitted that the parcel of land described in subdivision second of the answer herein belongs to the Saint Paul and Duluth Railroad Company, and that it was not held, used or
95 occupied for right of way, gravel pits, side tracks, depots, and there were no buildings or structures thereon which were necessarily used in the actual management or operation of said railroad or any part thereof.

It was admitted that the northwest quarter of section seven (7), township forty-seven (47), range twenty-seven (27), Aitkin county, Minnesota, described in the third (3d) paragraph of said answer is the property of the Northern Pacific Railroad Company, and it was further admitted that it is not held, used or occupied for right of way, gravel pits, side tracks, depots, and that there are no buildings or structures thereon which are necessarily used in the actual management and operation of said railroad.

It was further admitted that the northwest quarter of the southwest quarter of section fourteen (14), township forty-seven (47), range twenty-seven (27), is the property of the Great Northern Railway Company, and that it is not held, used or occupied for right of way, gravel pits, side tracks, depots, and that there are no buildings or structures thereon which are necessarily used in the actual management and operation of said railroad.

It was admitted that house file number one (1) of the legislature of 1895, of which chapter one hundred and sixty-eight (168) of the General Laws of 1895 is a copy, was, after being engrossed and enrolled, signed by Frank A. Day, as president of the senate, and transmitted to the governor for his approval.

It was also admitted that the copy of the ballot attached to the defendant's answer herein is a copy of the ballot prepared by
96 the secretary of state, and used for the election of State officers at the general election, November, 1896.

Plaintiff rests.

Defendant at this time moves that the alternative writ of mandamus herein be discharged, and that the defendant be permitted to go without day for the reason that there is no proof that there is any law under which these lands are subject to ordinary taxation, and no proof that the laws under which the exemption is pleaded and claimed have been amended or repealed.

Motion denied. Defendant duly excepted.

Defendant rests.

Thereupon the case was fully argued by counsel for both parties and taken under advisement by the court.

It is hereby stipulated that the foregoing may be settled and allowed as the settled case in the above-entitled proceeding.

Dated St. Paul, November —, 1897.

A. Y. MERRILL,
H. W. CHILDS,
Attorneys for Relator.
HADLEY & ARMSTRONG,
Attorneys for Defendants.

The foregoing having been examined by me and found by me to be conformable to the truth, it is hereby settled and allowed as the settled case in the said cause, and I hereby certify that the same contains all the evidence and proceedings had before me upon the trial of said action.

Dated Brainerd, January 11, 1898.

G. W. HOLLAND,
District Judge.

97 STATE OF MINNESOTA, }
County of Aitkin. }

District Court, Fifteenth Judicial Dist.

STATE OF MINNESOTA on Relation of JAMES N. MARR, Plaintiff, }
vs.
FRED STEARNS, as County Auditor of Aitkin County, Minn., Defendant. }

Notice of Appeal.

You will please take notice, that the above-named defendant appeals to the supreme court of the State of Minnesota, from the judgment of this court in this action, entered on the sixteenth day of December, 1897.

Dated January 13, 1898.

HADLEY & ARMSTRONG,
Attorneys for Defendant.

To H. W. Childs and A. Y. Merrill, attorneys for plaintiff; and Frank E. Seavey, clerk of the district court.

98 STATE OF MINNESOTA, }
County of Aitkin. }

District Court, Fifteenth Judicial Dist.

STATE OF MINNESOTA on Relation of JAMES N. MARR, Plaintiff, }
vs.
FRED STEARNS, as County Auditor of Aitkin County, Minn., Defendant. }

Waiver of Bond.

The undersigned, attorneys for the plaintiff in the above-entitled action, hereby waive the appeal bond for costs upon the appeal of the defendant from the judgment rendered in the above-named court on the sixteenth day of December, A. D. 1897.

A. Y. MERRILL,
H. W. CHILDS,
Attorneys for Plaintiff.

99 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898. No. 31.

STATE *ex Rel.* J. N. MARR, Respondent,
vs.
FRED STEARNS, as County Auditor of Aitkin County, Appellant. } 11037. Syllabus.

1. The president *pro tempore* of the State senate does not cease to — a senator when he becomes lieutenant governor by reason of a vacancy in the office of governor and a corresponding vacancy in the office of lieutenant governor.
2. Held, that chapter 168, Laws 1895, relating to the taxation of railroad lands was duly enacted and properly submitted at the general election of 1896 to the electors for adoption and ratification as required by the constitution.
3. The existence of a public law, whether it be in the form of a statute or a constitutional amendment, is a fact of which courts must take judicial notice. If, as in this case, its validity depends on the fact whether it was ratified by a majority vote of all the electors voting at the election at which it was submitted, the court will take judicial notice of the number of ballots cast at the election and the number cast for the law, and inform itself as to such facts by resorting to the election returns and records in the office of the secretary of state or in the offices of the several county auditors or by any other means it deems safe and proper.

100

4. Held, that the law here in question was adopted and ratified by a majority of all the electors voting at the election at which it was submitted.
5. The statutes of this State, enacted subsequently to the adoption of the constitution, providing for a commuted system of taxation of the property of railroad companies by permitting them to pay an annual gross-earnings tax in lieu of the taxation of their property on the basis of a cash valuation, were unconstitutional until validated by the constitutional amendment of 1871, art. IX, s. 32*a*. Such validation was a qualified one, the right to repeal or amend the statutes being reserved; hence, chapter 168, Laws 1895, does not impair the obligations of any contracts and is constitutional.

Judgment affirmed.

101 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898. No. 31.

STATE OF MINNESOTA *ex Rel.* J. N. MARR, Respondent,
vs.
FRED STEARNS, as County Auditor of Aitkin County, Appellant. } 11037.

Opinion.

This is an appeal from the judgment of the district court of the county of Aitkin, adjudging that a peremptory writ of mandamus issue directing the appellant as county auditor to place three certain parcels of land upon the tax-list of the county for the year 1897. The first tract is the property of the St. Paul & Duluth Railroad Co., the second is owned by the Northern Pacific Railroad Co., and the last belongs to the Great Northern Railway Co.

Each of the railway companies acquired its land by grants from the State or United States made after the adoption of our Constitution, and all statutes affecting the question of their taxation were enacted subsequently to that event. No part of the lands here in question are in any manner connected with or used in the operation of the railways of the respective companies, and they do not and will not, when sold, increase the aggregate of the gross earnings of the companies upon which they pay a tax.

The trial court held, in effect, that these lands are now taxable by virtue of the provisions of ch. 168, Laws 1895, relating to the taxation of certain lands owned by railroad companies. The appellant claimed that this chapter was never enacted by the legisla-
102 ture nor submitted to and adopted and ratified by the electors of the State, but if it was it is void because it impairs the contract between the State and the railroad companies as to taxation of their lands and other property.

1. The first objection made to this statute is to the effect that it did not receive in the State senate the necessary vote of a majority of the members elected to that body, because the Hon. Frank A. Day, who voted for the bill and whose vote was necessary to pass it, was not then a senator and his vote thereon was void. Assuming that the question whether this statute ever passed the senate depends upon the legality of Mr. Day's vote, we hold that his vote was not a nullity and that the bill was properly passed. The undisputed facts as to this question are that Mr. Day was duly elected as a senator from the sixth senatorial district of this State for the term of four years, commencing January, 1895. He qualified, entered upon the duties of the office, and on January 25th, 1895, became president *pro tempore* of the senate. Six days thereafter Governor Nelson resigned and Lieutenant Governor Clough became governor, and thereafter and until the close of the twenty-ninth session of the senate Mr. Day performed the duties of and acted as lieutenant governor. He also until the close of the session continued to act and vote as senator with the tacit

approval, at least, of the senate. Upon the opening of each day's session of the senate and upon every call of the house and upon all votes taken upon any bill or resolution his name was regularly called as one of the senators. The conclusion which the appellant claims from these facts is that Mr. Day *ipso facto* became lieutenant governor when Governor Clough became governor, and that thereafter he was not and could not under the constitution be
103 a senator either *de jure* or *de facto*. This conclusion is based upon the proposition that whenever the lieutenant governor becomes governor during a vacancy in that office for any cause, and the president *pro tempore* becomes lieutenant governor by reason of a vacancy in the latter office, his office as senator becomes absolutely vacant.

The provisions of the constitution which have a bearing directly or indirectly on this question are these:

(*a.*) The powers of government shall be divided into three distinct departments—legislative, executive, and judicial—and no person or persons belonging to or constituting one of these departments shall exercise any of the powers belonging to either of the others, *except in the instances expressly provided in this constitution.*

The legislature of the State shall consist of the senate and house of representatives.

The executive department shall consist of a governor, lieutenant governor, &c.

The lieutenant governor shall be *ex officio* president of the senate, and in case a vacancy shall occur from any cause whatever in the office of governor he shall be governor during such vacancy. The compensation of a lieutenant governor shall be double the compensation of a State senator. Before the close of each session of the senate they shall elect a president *pro tempore*, who shall be lieutenant governor in case a vacancy shall occur in that office. Art. 3, sec. 1; art. 4, sec. 1; art. 5, sec. 1 and 6.

(*b.*) Each house shall be the judge of the election returns and eligibility of its own members. The house of representatives shall elect its presiding officer. No senator or representative shall
104 during the time for which he is elected hold any office under the authority of the United States or the State of Minnesota except that of postmaster. Every bill having passed both houses shall be carefully enrolled and shall be signed by the presiding officer of each house. Art. 4, ss. 3, 5, 9.

(*c.*) The house of representatives shall have the sole power of impeachment. All impeachment shall be tried by the senate, and when sitting for that purpose the *senators* shall be upon oath. All the offices in the executive department (except the lieutenant governor) and the judges of the supreme and district courts may be impeached and removed from office for corrupt conduct therein. No officer shall exercise the duties of his office after he shall have been impeached and before his acquittal. On the trial of an impeachment against the governor the lieutenant governor shall not act as a *member of the court.* Art. IV, s. 14 and, art. XIII, ss. 1, 3, 4.

The constitution was intended to provide a complete and har-

monious scheme of State government, and to provide against the possibility of any interregnum in the office of governor, or interruption in the exercise of the functions and powers of that office. The several provisions of the constitution we have quoted were adopted at the same time, and must be construed together as a whole and with reference to the purposes for which the constitution was ordained. It is not permissible to select a single isolated provision and give it effect according to its literal reading without reference to modifications made by the express language of other provisions of the instrument.

The contention of the appellant that whenever there is a vacancy in the office of lieutenant governor the president of the senate *pro tempore* becomes as fully and completely lieutenant governor for the residue of the term as if he had been originally elected, and thereupon his office of senator becomes absolutely and permanently vacant as to him, cannot be sustained without disregarding both the letter and spirit of *of* the constitution, when considered as a whole, and without adopting a construction well calculated, when party strife and spirit are intense, to disturb the public peace and order. If, as claimed, the president *pro tempore* of the senate becomes lieutenant governor for the residue of the term in case of a vacancy in that office, it necessarily follows that the lieutenant governor when he becomes governor in case of a vacancy in the latter office for any cause holds that office for the residue of the term; or, in other words, if a vacancy from any cause in the office of governor or lieutenant governor occurs it is necessarily an absolute and permanent one. This proposition, if correct, would logically tend to support the further claim that when the president *pro tempore* once becomes lieutenant governor his office of senator is absolutely and permanently vacant as to him. On the other hand, if the constitution recognizes both permanent and temporary vacancies in the offices of governor and lieutenant governor such fact has an important bearing on the question whether the president *pro tempore* ceases to be a senator when he becomes a lieutenant governor. This brings us to the consideration of the meaning of the word vacancy as used in the constitution in reference to the office- of governor and lieutenant governor.

The constitution provides that the lieutenant governor shall be *ex officio* president of the senate, and in case a vacancy shall occur *from any cause whatever* in the office of governor he shall be governor during such *vacancy*, but it does not in express terms declare when or for what causes a vacancy shall exist in the office of governor. The language used, however, clearly implies that such vacancy may occur from several causes, and may be either permanent or temporary. This was the construction given to the constitution by the first legislature convened after its adoption, which provided that in case of death, *impeachment*, resignation, or removal of the governor from office, the lieutenant governor shall exercise the office of governor until he be *acquitted* or another governor shall be duly qualified. Laws 1858, ch. 87, sec. 10. Again, within a few years after the adoption of the constitu-

tion and during the civil war the lieutenant governor, as governor *ad interim*, exercised the powers and discharged the duties of the office of governor during the necessary absence of the governor from the State.

The governor may be impeached, but he is forbidden by the constitution to exercise any of the duties of his office after he has been impeached and before his acquittal. The time between the preferring of articles of impeachment against him by the house of representatives and the close of his trial by the senate may be several months. The office cannot remain vacant during such time, for there can be no suspension of the powers and duties of the office of chief executive. The power and duty to command the military forces of the State, to execute the laws, to suppress riots and insurrections, to fill vacancies in office, and to grant and demand the surrender of fugitives from justice are of necessity continuous, and the necessity for their exercise may arise at any time. The powers of the office must be exercised during such vacancy by some one, and the constitution provides that the lieu-
107 tenant governor shall be governor during such vacancy.

Necessarily, in case of the impeachment of the governor, such vacancy may be either permanent or temporary, depending on the verdict of the senate. If it convicts, the vacancy is permanent. If it acquits, it is temporary. If the vacancy in the office of governor occasioned by his impeachment is not to be filled, the State government is without an executive head for months. But if the vacancy is filled by the lieutenant governor, and he thereby becomes governor "as fully and completely as though he had been legally elected in the first instance to that office," then to prefer articles of impeachment against the governor is to remove him permanently from office, although the senate promptly acquit him. Such a construction of the constitution would be a menace to the peace and order of the State.

If the governor is incapacitated by illness so that he cannot exercise the powers of his office, then, if the proposition contended for by the appellant is correct, either the office must remain vacant during his illness or be filled by the lieutenant governor for the balance of the term. In such a case there is no escape from the conclusion that either there is to be an interregnum in the office of governor during his illness, which may or may not continue to the end of his term, or that his illness at once permanently removes him from office, although he speedily recovers. A construction of the constitution which would lead to the results suggested by these illustrations must be rejected.

It is clear that the vacancy in the office of governor provided for by the constitution may arise from a variety of causes, such
108 as his death, resignation, impeachment, illness, or absence from the State; that it is necessarily permanent or temporary, according to the facts of each case; that the lieutenant governor is governor only during such vacancy, and that in case of a temporary vacancy he is governor only for the time being, and when the tem-

porary vacancy ends the governor returns to his office and the lieutenant governor to his.

A corollary of this proposition is that the vacancy in the office of lieutenant governor, upon the occurrence of which the president *pro tempore* of the senate becomes lieutenant governor, is of the same character as the vacancy in the office of governor. The vacancy in the office of lieutenant governor may be permanent or temporary, depending on the character, cause, and duration of the vacancy in the office of governor. Such being the case, the president *pro tempore* when he becomes lieutenant governor for the time being during such vacancy ought not to be held to be no longer a senator unless the express words of the constitution imperatively require such a construction. There are no such words or provisions in the constitution and such a construction cannot be given to it and at the same time give effect to other provisions of that instrument. All of the reasons we have suggested why the office of lieutenant governor does not become absolutely and permanently vacant as to that officer as soon as he is called upon to act as governor during a temporary vacancy apply with greater force to the president *pro tempore* of the senate, for if the senatorial office of the president *pro tempore* is rendered absolutely vacant as to him by his becoming lieutenant governor, then such a result follows upon the happening of the first vacancy in the office of governor for any cause or for any duration; and in case such vacancy is only temporary, then at its termination the governor resumes
109 his office, the lieutenant governor his, and the president *pro tempore* will be out of office entirely and the people of his district deprived of the right to be represented in the senate until his successor can be elected. There is no language in the constitution requiring or justifying the conclusion that the senatorial office of the president *pro tempore* becomes vacant when he becomes lieutenant governor by reason of and during a vacancy in the office of governor. On the contrary, there is no escape from the conclusion that the president *pro tempore* does not cease to be a senator when he becomes lieutenant governor by reason of a vacancy in the governor's office. This conclusion is further supported by the character of the duties of lieutenant governor and of the president *pro tempore*. They are identical. Neither of them has any power or duty properly belonging to the executive department. True, the lieutenant governor is declared to be an officer of the executive department and that no person belonging to one of the departments shall exercise any of the powers properly belonging to either of the others except in instances expressly provided for by the constitution; but the fact remains that his classification is simply one of convenience and that he is not authorized to exercise a single power or perform a single duty as lieutenant governor properly belonging to the executive department. His sole constitutional duties are to preside over the senate (he is not a member thereof, and has no vote even in cases where the senators are evenly divided) and to authenticate by his signature the bills passed by the senate. These duties and powers belong strictly and properly to

the legislative department. They are the precise duties imposed by the constitution on the presiding officer of the house of
110 representatives, and there is just as much reason for claiming that the speaker of the house when elected ceases to be a member thereof as there is to claim that a senator who is president *pro tempore* ceases to be a senator when he becomes lieutenant governor.

That it was not intended by the constitution to confer executive powers upon the lieutenant governor as such is also apparent from the fact that he cannot be impeached, although all the other officers of the executive department may be. A senator, therefore, when he becomes lieutenant governor because he happens to be president *pro tempore* of the senate, is not called to the discharge of any executive duties. All of his new duties properly belong to the legislative department, and there is no reason why his senatorial office should become vacant, but every reason to the contrary. There is just as much warrant in the constitution for claiming that a senator ceases to be such when he is elected president *pro tempore* as there is to claim that such result follows when he becomes lieutenant governor.

It is suggested that the constitution does not require the senate to elect one of its own members its president *pro tempore*. Neither does it expressly require that the presiding officer of the house of representatives shall be a member thereof; but from the adoption of the constitution to the present time the presiding officer of the senate and house has always been a member of the body over which he was elected to preside. This practical construction of the constitution is the correct one, with the possible qualification that no senator under the age of twenty-five years can be elected president *pro tempore* for the reason that both the governor and lieutenant
111 governor must be at least twenty-five years of age.

The prohibition of the constitution that no senator or representative *shall during the time* for which he is elected hold any office except that of postmaster is relied upon by counsel for appellant in support of the proposition that when Mr. Day became lieutenant governor he ceased to be senator. They state in one of the briefs the argument thus: "That the two offices of lieutenant governor and senator are incompatible is made explicit by this provision. The result must follow that Mr. Day having become lieutenant governor he ceased to be senator." If the premises of counsel are correct they are fatal to their conclusion, for Mr. Day was a senator before he was either president *pro tempore* or lieutenant governor. He was a *de jure senator* constitutionally elected for the term of four years, *during which time* he was prohibited from holding any other office under the authority of the State even if he had resigned the office of senator. The result must follow from a literal reading of the section that, being ineligible to any other office, he continued to be a *de jure senator*. It is obvious that this section of the constitution does not explicitly or otherwise make the two offices of lieutenant governor and senator incompatible nor a senator ineligible to the office of lieutenant governor during the term for which he

was elected, for it is otherwise expressly provided by the constitution that a senator who is president *pro tempore* shall become lieutenant governor in case of a vacancy. Indeed, this particular section has but little relevancy to the question under consideration except to emphasize the necessity of construing the several provisions of the constitution as a harmonious whole and not each section by itself.

112 There remains one other provision of the constitution to be considered in this connection, which is inconsistent with the appellant's claim: "On the trial of an impeachment against the governor, the lieutenant governor shall not act as a member of the court." This is an express recognition of the fact that a senator may be a lieutenant governor, for the court for the trial of impeachments is the senate, and it is composed exclusively of senators who shall be upon oath. If in such cases the lieutenant governor was not also a senator, he could not take the oath as senator and act as a member of the court, but the constitution provides for cases where the lieutenant governor is also a senator, and would, except for this express prohibition, be entitled to act as a member of the court as senator. This prohibition would be wholly unnecessary except upon the assumption that a senator did not vacate his office on becoming lieutenant governor.

Our conclusion is that Mr. Day did not cease to be senator when he became lieutenant governor.

2. Was the law, chapter 168, Laws 1895, submitted to the electors in compliance with the constitution and the statute? We answer the question in the affirmative. The constitution, art. IV, s. 32*a*, adopted in 1871, provides as follows:

"Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this State or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property, at and during the time and periods therein specified, pay into the treasury of this State

113 a certain percentage therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same shall take effect and be enforced, be submitted to a vote of the people of the State, and be adopted and ratified by a majority of the electors of the State voting at the election at which the same shall be submitted to them."

The form of the submission of the act in question to the electors, as printed on the ballot, was this:

For taxation of railroad lands	Yes.	
	No.	

The appellant claims that "the form of ballot adopted was a cunning political device to catch votes; an evasion of the constitu-

tion, which requires that the law itself shall be submitted to the voters;" hence it was never submitted to the vote of the people. The question here is not whether the form of the ballot selected by the legislature is the best and fairest that could have been framed by a trained lawyer, but it is, Did the form of ballot actually used comply with the constitution? Neither the form nor the manner of submitting the question of the amendment to the people is prescribed by the constitution. They are left to the judgment and discretion of the legislature, subject only to the implied limitation that they must not be so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote. It cannot be claimed, in reason or justice, that this case falls within this limitation. The form was prescribed by the act itself, which was a public statute so far as it was in the power of the legislature to make it such. It was published with the
114 general laws of 1895, and fully advised the electors, not only as to the provisions of the act, but also how they were to express their decision upon the question of ratifying the act. The constitution requires that all amendments to that instrument shall be submitted to the people for their approval or rejection. There is no essential difference between this requirement and the one as to the submission of the law in question; therefore, if it was necessary to print the law upon the ballot or refer to it by its title, then the same particularity would be required in submitting constitutional amendments. Such, however, has not been the legislative or practical construction of the constitution, for there are a large number of important amendments to the constitution which were submitted by a ballot upon which there was no suggestion as to the nature of the amendment. It has never been suggested that such amendments are void. The act in question was properly submitted to the people.

3. The act under consideration is further assailed on the ground that it was not ratified by the popular vote. The law was submitted to the people at the general election of 1896 and there were cast and counted for it 235,585 votes and 29,530 votes against it, but by virtue of the constitution it was not adopted and ratified unless a majority of all the electors who voted at the election voted for it. A majority in favor of it of all the votes cast upon the proposition is not sufficient. It is conceded that the vote on the proposition was as we have stated. It is then mathematically true that the law was adopted by a majority of all of the electors, unless there were cast at the general election of 1896 at least 471,170 ballots.
115 Courts will take judicial notice of whatever is generally known within the limits of their jurisdiction.

1 Greenleaf Ev., s. 6.

Lanfear *v.* Gestier, 89 Am. Dec., 663; *notes.*

Now, every intelligent man in the State knows, from the census and election returns and the general and political history of the State, that there were not cast at the last general election 471,170 votes. We do not, however, rest our conclusion that this law re-

ceived a majority of all the votes cast at the election upon this ground, but upon the broad ground that the existence of a public law is a fact of which courts will take judicial notice without pleading or proof. Judicial notice does not depend upon the actual knowledge of the judges. When the fact is alleged they must investigate, and may refresh their recollections by resorting to any means which they may deem safe and proper.

Brown *v.* Piper, 91 U. S., 42.

Gardiner *v.* Collector, 6 Wall., 499.

Courts, however, do not take judicial notice of votes and elections, except so far as they affect the validity of some public law. The rule is stated by Judge Brewer in these words: "The courts are to know what is and what is not a public law of the State; what is and what is not a part of the constitution, and to that end must take judicial notice of everything, near or remote, that determine such fact. The courts take judicial notice of what is public law, statutory or constitutional. When a majority of the electors voting on an amendment at an election properly ordered adopts it, then it becomes a part of the constitution. So the constitution
116 itself says. The courts must judicially know whether such amendment has been adopted and is in fact a part of the constitution, and to that end, if need be, must take judicial notice of every ballot cast at that election." It, the rule, is stated in State *v.* Cooley, 56 Minn., 554, thus: "Courts will take judicial notice of all facts bearing on the constitutionality of the law."

The validity of this law depends upon the fact whether it received a majority of all of the votes cast at the election, not on the subsequent act or omission of the State canvassing board or of any other officers. For the purpose of determining this fact the court will take judicial notice of the election records, returns and canvass thereof by the State board in the office of the secretary of state, and, if necessary, of the election returns and canvass in the offices of the several county auditors of the State. We have found it necessary to refer only to the election returns and records in the office of the secretary of state and have there found appropriate, clear, and satisfactory information upon the question whether the act was adopted and ratified by a majority of the electors voting at the election, and are able to and do answer the question in the affirmative.

The election returns in the office of secretary of state on December 22, 1896, when the votes were canvassed by the State board, showed that the total number of ballots cast at the last general election was 343,319, but no returns as to the total number of ballots cast had then been received from seven counties, and the board made no declaration to the effect that the law had been adopted; their certificate gave only the vote for and against the proposition. Shortly after the canvass and before the trial of this action in the dis-
117 trict court, returns certified by the county auditor were received from each of the seven counties, giving in the aggregate the total number of ballots cast at the election in his county. These returns show that the total ballots cast in the seven counties were 17,979, which added to the 343,319 previously returned from the

other counties give 361,298 as the total number of ballots cast at the election. As no elector was authorized to cast more than one State ballot, it follows that 361,298 electors voted at the election, and no more. It was therefore necessary that 180,650 votes should be cast for the law in order to adopt it. It received 235,585 votes, or 54,935 more than were legally necessary.

4. This brings us to the last contention of the appellant. It is, in effect, that the several statutes of the State providing for the payment by the several railway companies of a gross-earnings tax in lieu of taxation of their property in specie are irrevocable contracts between the State and the companies, the obligations of which chapter 168, Laws 1895, impairs.

It must be conceded, in obedience to the decisions of the Supreme Court of the United States, that a State may by its legislature, in the absence of constitutional inhibitions, irrevocably limit or contract away its right of taxation.

It is, however, as decisively settled by the same court that the taxing power of the State will not be held to have been surrendered or limited unless such surrender is expressed in terms too clear to admit of a doubt. It must be expressed in clear, unambiguous language which will admit of no reasonable construction
118 consistent with the reservation by the State of the unimpaired power of taxation, for it is a sovereign power absolutely essential to the continued existence of the State.

It is not necessary to here set out the terms of the several statutes under which it is claimed that the lands of the railway companies are exempt from taxation in the usual manner of taxing real estate. They in effect provide for a commuted system of taxing railroad property by permitting the railway companies to annually pay to the State a specified percentage on their gross earnings in full of all other taxes and assessments on their property. The St. Paul & Duluth and the Northern Pacific accepted the provisions of these statutes. The Great Northern never has.

Under the canon of construction applicable to statutes which are claimed to irrevocably limit or absolutely relinquish the power of taxation by the State, it is not clear that the statutes here in question can be construed as irrevocable contracts, for the language used is not so specific as to preclude all argument, inference, or presumption against the claim of the appellant. The statutes do not contain any express stipulations that the percentage shall not be increased or diminished or the system of taxation changed to meet changed conditions in the future. What might have been a fair and equal gross-earnings tax when these statutes were enacted might be grossly unequal under changed conditions, such as an increase in the value of the land grants of the companies or the necessity for an increase in the rate of taxation for State, county, school, and local purposes; but it is not our purpose to decide the question here suggested, for we place our decision that the statutes under which the railroad companies claim do not constitute irrevocable contracts be-
119 tween them and the State that their lands shall never be taxed as other land is taxed by the State upon the broad

ground that when the statutes were enacted they were unconstitutional.

Such statutes were in violation of article IX, ss. 1 and 3 of the constitution, the here material provisions of which are: "Sec. 1. All taxes to be raised in this State shall be as nearly equal as may be and all property on which taxes are to be levied *shall have a cash valuation* and be equalized and uniform throughout the State. Sec. 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also *all real estate and personal property according to its true value in money.*"

Section three also expressly exempts certain property from taxation. If it be conceded that a commuted system of taxation, whereby a percentage on gross earnings is accepted in lieu of taxation of railway property in specie, might be so adjusted as not to be obnoxious to the constitutional requirement of uniformity and equality of taxation, it is clear that an irrevocable contract, fixing for all future time the rate of taxation on such gross earnings, would not continue to be uniform and equal taxation, because the value of property changes from time to time and the necessities of the State also change, demanding an increased rate of taxation. This is especially true as to town, village, city, and county taxes. But uniformity and equality of taxation are not the only mandates of the constitution, for it further commands that all property on which taxes are to be levied (that is, all property not exempt from taxation) shall have *a cash valuation*, and that laws shall be passed taxing all real and personal property according to its *true* 120 *value in money.*

The language of the constitution is clear, exact, and imperative. It requires that all property not exempt must be taxed, and that the basis of such taxation must be the cash value of the property. As was said by this court in the case of Rice County *v.* Citizens' National Bank, 23 Minn., 287:

"The leading and controlling purpose of these provisions was to subject all property of every kind and nature within the jurisdiction of the State, except such as is specially authorized to be exempted, to taxation upon a basis of a cash valuation and to secure, so far as practicable, absolute equality and uniformity in the apportionment of taxes, so that every piece of property should bear its just and proportionate share of the public burden in the exact ratio of its cash value to that of the entire taxable property of the State."

It may be true, as claimed, that a gross-earnings tax (if subject to amendment) is only another mode of arriving at equal taxation, and that such a system of commuted taxation of the property of railway companies and similar corporations is of great practical and material advantage to the State, but the fact remains that the taxation of all property upon the basis of its cash value was the sole rule ordained by the constitution to secure equality and uniformity of taxation. Thus, in Stinson *v.* Smith, 8 Minn., 366 (which arose before the amendment to the constitution as to assessments for local improvements), it was held that a statute providing for the assessment of the cost of such improvement upon real estate in propor-

tion to benefits was unconstitutional because all property on which taxes are to be levied must have a cash valuation. A com-
121 muted system of taxation of mining lands, property, and products by the payment of a tonnage tax on all ore mined and disposed of, in lieu of all other taxes, was held invalid by this court because in conflict with article IX, sec. 1, of the constitution.

State *v.* Lakeside Land Co., 73 N. W., 970.

There is no decision of this court which holds that statutes of the State providing for the payment of a gross-earnings tax by railway companies and exempting their property from taxation in specie upon the basis of a cash valuation were constitutional prior to their ratification by the amendment of 1871, art. IX, s. 32*a*.

There is a clear intimation to the contrary in several cases, notable in those which follow the Parcher case, 14 Minn., 297, sustaining the validity of territorial statutes providing for a gross-earnings tax for the old land-grant railway companies—that is, those which are organized under charters granted prior to the adoption of the constitution.

It is further claimed on behalf of the appellants that the mandates and inhibitions of the constitution as to the taxation of all private property have no application to public lands which passed into private ownership with the privilege of commuted taxation created with respect to them while they were yet public lands. If this proposition is true, then the legislature, if there are no other constitutional provisions prohibiting it, may provide for exempting from taxation the school lands of the State after their sale and after they have become absolutely private property, or provide that the owners thereof may forever pay a percentage on the gross or net income derived therefrom in lieu of all other taxes.

The mandate of the constitution applies to all property which is the subject of private ownership, without reference to the
122 source of its acquisition. It would be a palpable evasion of the constitution to permit the legislature to absolutely transfer public lands to private owners vested with privileges and immunities as to taxation which are prohibited by the constitution.

We hold that the statutes under which it is claimed that the lands in question are exempt from taxation in the ordinary way upon the basis of their cash valuation were unconstitutional when enacted, and remained so until validated by the constitutional amendment of 1871.

The legal effect of such amendment was to validate them.

State *v.* Luther, 56 Minn., 156.

But this ratification or validation of the statutes was a qualified one, and the right to repeal or amend them was reserved by necessary implication, provided such repeal or amendment was adopted and ratified by a majority of the electors.

Our conclusion is that chapter 168, Laws 1895, does not impair the obligation of any contract between the State and railway com-

panies, and that the lands here in question are taxable in the ordinary way as other lands are taxable.

Judgment affirmed.

START, *C. J.*

123 [Endorsed:] No. 11037. State of Minnesota, supreme court. State *ex rel.* J. N. Marr, respondent, *vs.* Fred Stearns, as county auditor, etc., appellant. Copy of opinion and syllabus. Original. Filed May 11th, 1898. D. F. Reese, clerk. April term, A. D. 1898. Start, C. J.

124 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

STATE OF MINNESOTA *ex Rel.* JAMES N. MARR, Respondent,
vs.
FRED STEARNS, as County Auditor of Aitkin County, Minnesota, Appellant, } No. 31.

Pursuant to an order of court duly made and entered in this cause on the 20th day of June, A. D. 1898—

It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the fifteenth judicial district, sitting within and for the county of Aitkin, be, and the same hereby is, in all things affirmed; and it is further determined and adjudged that the respondent above named do have and recover of said Fred Stearns, as county auditor of Aitkin county, Minnesota, appellant herein, the sum and amount of one hundred sixty-one and $\frac{50}{100}$ dollars ($161.50), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 20th day of June, 1898.

By the court:

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$
Clerk's fees, for making return	
Printer's fees	150.00
Clerk's fees, supreme court	11.50
Filing mandate	
Affidavits and acknowledgments	
Postage	
Copying returns for printer	
	$161.50

125 [Endorsed:] 11037. State of Minnesota, supreme court. Transcript of judgment. Filed June 20, A. D. 1898. D. F. Reese, clerk. —— ——, attorney for —. Page No. 61, "W" book.

STATE OF MINNESOTA, *ss*:

Supreme Court.

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this twentieth day of June, A. D. 1898.

D. F. REESE, *Clerk*.

126 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

STATE OF MINNESOTA *ex Rel.* JAMES N. MARR, Respondent, *vs.* FRED STEARNS, as County Auditor of Aitkin Co., Minn., Appellant.	No. 31. Appeal from District Court, Fifteenth Judicial District, County of Aitkin.

This cause having been duly argued and submitted at the general April term of this court, A D. 1898, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered June 20, A. D. 1898.

By the court:

Attest: D. F. REESE, *Clerk*.

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk*.

127 [Endorsed:] No. 11037. State of Minnesota, supreme court. Copy of order for judgment. Filed June 20, A. D. 1898. D. F. Reese, clerk. Entered on page 173, M.

128 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1898.

THURSDAY MORNING, 9.30 O'CLOCK, *April 7, A. D.* 1898.

Court convened pursuant to adjournment, all the justices being present.

STATE OF MINNESOTA *ex Rel.* JAMES N. MARR, Respondent,
vs.
FRED STEARNS, as County Auditor of Aitkin Co., Minn., Appellant.
Cal. No., 31.
Reg. No. 11037.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

A true record.

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*
R.

129 [Endorsed:] 11037. State of Minnesota, supreme court. Copy of minutes of argument. Filed June 20, A. D. 1898. D. F. Reese, clerk.

130 [Endorsed:] No. 11037. State of Minnesota, supreme court. State of Minn. *ex rel.* Jas. N. Marr, respondent, against Fred Stearns, as county auditor of Aitkin Co., appellant. Judgment-roll. Filed June 20, 1898. D. F. Reese, clerk.

131 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, *Office Clerk of Supreme Court,* } ss:

I, D. F. Reese, clerk of said supreme court, do hereby certify and return that the foregoing and attached papers are a full, correct, and complete copy of all the papers on file in my office in the action therein entitled and of the whole thereof; also the original citation and proof of service thereof and original writ of error and assignments of error to the Supreme Court of the United States, and the same constitutes and is the full and complete return to the writ of error issued and allowed in said cause.

In witness whereof I hereto subscribe my name and affix the seal of the supreme court of the State of Minnesota, at the capitol, in the city of St. Paul, this 27th day of June, A. D. 1898.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court of the State of Minnesota,
By J. L. HELM, *Deputy.*

Endorsed on cover: Case No. 16,929. Minnesota supreme court. Term No., 344. Fred Stearns, as county auditor of Aitkin county, Minnesota, plaintiff in error, *vs.* The State of Minnesota on the relation of James N. Marr. Filed July 11th, 1898.

Office Supreme Court U.S.
FILED
NOV 14 1898
JAMES H. McKENNEY,
Clerk.

20

No. 344.

Motion to advance.

Filed Nov. 14, 1898.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

FRED STEARNS, AS COUNTY AUDITOR OF AITKIN COUNTY, MINNESOTA,
Plaintiff in Error,
vs.
THE STATE OF MINNESOTA, ON THE RELATION OF JAMES N. MARR,
Defendant in Error.

No. 344.

Writ of Error to Supreme Court of State of Minnesota.

MOTION TO ADVANCE.

Now comes the parties above named, plaintiff in error, by C. W. Bunn and Emerson Hadley, his counsel, and the defendant in error, by H. W. Childs, Attorney General of the State of Minnesota, and A. Y. Merrill, his counsel, and move the Court to advance this cause and set the same down for argument at as early a day as will suit the convenience of the Court.

The following is a brief statement of the matter involved in this suit and reasons for the application.

This proceeding was commenced in the District Court of the State of Minnesota, of the Fifteenth Judicial District, in 1897, to compel the plaintiff in error, Auditor of Aitkin County, to place certain parcels of land upon the tax rolls of the county for that year. One parcel of land belonged to the land grant of the Saint Paul and Duluth Railroad Company, one to the land grant of the Northern Pacific Railroad Company, and one parcel belonged to the Great Northern Railway Company. The defendant in error claimed that the said lands were taxable by virtue of the provisions of Chapter 168, of the General Laws of Minnesota, of the year 1895, providing for the taxation of lands granted to railroads. The plaintiff in error claimed that the law was not properly enacted and further that the lands granted to the Saint Paul and Duluth Railroad Company, formerly the Lake Superior and Mississippi Railroad Company, were not subject to ordinary taxation for the reason that the railroad had an irrevocable contract with the State that in consideration of the railroad Company paying a gross earnings tax such lands should not be taxed until sold by the Railroad Cnmpany by virtue of Chapter 8, Special Laws of Minnesota of 1865, and that the Northern Pacific Railroad Company had a similar irrevocable contract by virtue of Chapter 65, of the Special Laws of Minnesota of the year 1870, and that any repeal of said laws without consent of the railroad companies would be contrary to the provisions of the Constitution of the United States. The defendant in error claimed that said laws were not irrepealable contracts and that the act of 1895 repealed them. The court held that the law of 1895 was valid and that the lands were properly taxable, and ordered them put on the tax rolls. On appeal

to the Supreme Court of the state, the decision of the lower court was affirmed, and a writ of error was taken from this court.

This case thus involves the taxability of all the unsold granted lands of the Saint Paul and Duluth Railroad Company, formerly the Lake Superior and Mississippi Railroad Company, and of the Northern Pacific Railroad Company. These granted lands of the Saint Paul and Duluth Railroad Company, at the commencement of this proceeding, amounted to about nine hundred and seventy thousand (970,000) acres, and those of the Northern Pacific Railroad Company in Minnesota to about five hundred and sixty thousand (560,000) acres. These lands have been taxed in the various counties where they are situated for the years 1897 and 1898, but the railroad companies owning the lands have refused to pay such taxes until the validity of the law under which they are taxed is adjudged by this court, and both the state and railroad companies are desirous of an early determination of the questions in issue. These lands are situated in many counties in the State of Minnesota, and the revenue of some of those counties is greatly impaired by reason of the failure of the companies to pay the taxes on said land, and it is of great importance to these counties and to the state to have the validity of the law in question finally adjudicated by this court so that the revenues of these counties may be regulated accordingly.

Another year's taxes will be levied in June and July, of 1899, and it is also important that the taxability of the lands in question be determined before that time, so that the rate of taxation in the counties where there are large quantities of these lands may be so fixed that it will produce sufficient and no more than sufficient revenue to pay the running expenses of said counties.

The amount of taxes assessed on the granted lands of the Saint Paul and Duluth Railroad Company for the year 1897, in the various counties where said lands are situated, was as follows: Pine, $17,984.93; St. Louis, $12,415.41; Carlton, $9,498.36; Benton, $204.76; Aitkin, $6,080.03; Anoka, $62.37; Chisago, $86.88; Cook, (about) $400.00; Crow Wing, $2,115.41; Isanti, $459.51; Itaska, $256.99; Kanabec, $3,922.06; Lake, $364.12; Mille Lacs, $1,808.13; Morrison, $1,815.23; Sherburne, $104.93. The amount of taxes assessed against granted lands of the Northern Pacific Railroad Company for 1897, in the various counties where said lands are situated, was as follows: Aitkin, $3,302.76; Becker, $3,245.31; Cass, $3,370.48; Clay, $2,484,64; Crow Wing, $3,574.32; Hubbard, $915.88; Itaska, $593,87; Morrison, $253.62; Mille Lacs, $32.69; Norman, $1,324.49; Otter Tail, $2,542.43; Pine, $9.69; St. Louis, $1,378.69; Todd, $1,400.41; Wadena, $2,877.66; Wilkin, $94.48.

In many of these counties the total amount of taxable property is comparatively small, and the question whether these granted lands belonging to the Saint Paul and Duluth Railroad Company and the Northern Pacific Railroad Company are taxable has an important bearing in determining the rate of taxation and the revenues of those counties.

The amount of taxes on these lands of the Saint Paul and Duluth Railroad Company and the Northern Pacific Railroad Company for the year 1897, which have not been paid and payment thereof is awaiting the determination of this action, is about eighty-five thousand dollars ($85,000) and the the taxes of 1898, amounting to about as much more, will be due and payable January 1st, 1899.

The railroad companies interested are also desirous of an early determination of the validity of the taxes in

question, for the reason that if the taxes are invalid they are a cloud on their title and hinder sales of their lands, and if they are valid taxes they desire to pay them and avoid the penalties and high rate of interest for which they will be liable for non-payment.

Dated Oct. 31st, 1898.

C. W. BUNN and
EMERSON HADLEY,
Counsel for Plaintiff in Error.

H. W. CHILDS, Attorney General and
A. Y. MERRILL,
Counsel for Defendant in Error.

No. 1092. 20
2585
NOV 6 1899
JAMES H. McKENNEY, Clerk.

Brief of Bunn for C. C.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed Nov. 6, 1899.

No. 1092.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, on relation of James N. Marr.

In Error to the Supreme Court of Minnesota.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR SO FAR AS CONCERNS NORTHERN PACIFIC LANDS.

C. W. BUNN,
Of Counsel for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 102.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, on relation of James N. Marr.

STATEMENT.

This is a writ of error from a final judgment of the supreme court of Minnesota, that being the highest court of the state. The opinion of the supreme court of Minnesota is printed in the Transcript, pp. 58 to 70, and reported in 72 Minn., p. 200.

The question here is, whether a certain act of the legislature of Minnesota, Laws 1895, chap. 168, violates the obligation of a contract. Briefly stated said law provides that all lands heretofore or here-

after granted by the state of Minnesota, or the United States, or the territory of Minnesota, to any railroad company shall be assessed and taxed as other lands are taxed (except such as are actually used for railroad purposes); and the law also provides that said railroad company shall continue to pay taxes into the state treasury upon its gross earnings in the same manner and in the same amount as now required by law; all laws providing for the exemption of such lands or for their taxation in any special or different manner are repealed.

The contract, which we assert has been violated, is contained in Special Laws of Minnesota, chap. 8, March 3, 1865, and Special Laws of Minnesota, chap. 65, March 4, 1870. The first of these laws provides in brief that the lands granted by the state to aid the construction of the Lake Superior and Mississippi Railroad shall be taxed in this manner; that the railroad company shall pay into the treasury of the state annually 3 per cent. of the gross earnings of the railroad, and this payment shall be in full of all tax and assessment whatever. The special act of 1870 referred to applies the act of 1865 to the Northern Pacific Railroad Company, which had been incorporated in 1864 by the act of Congress of July 2, and which road had not then been constructed through the state of Minnesota.

The proposition held by the state court was that there was no contract because these laws of 1865 and 1870 were void, being in conflict with the constitution of the state, adopted in 1858, Article IX, sections 1 and 3; which provide

in brief that all taxes shall be as nearly equal as may be, and all property on which taxes are levied shall have a cash valuation and be equalized and uniform throughout the state; and that laws shall be passed taxing all moneys, credits and investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money. 72 Minn. 220-224.

The decision of the state court is as we shall show not conclusive upon this point. It is for this court to decide whether the obligation of a contract has been violated; and this involves two inquiries, (a) whether there was a contract, (b) whether its obligation was violated.

For the proper understanding and presentation of this question a somewhat more detailed statement of the facts is necessary.

The constitution of the state was adopted in 1858, and Article IX, sections 1 and 3 read as follows:

> "Section 1. All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state."
>
> "Section 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money; but public burying grounds, public school houses, public hospitals, academies, colleges, universities and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for

any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation."

In 1865 the state was trustee under an act of Congress of certain land grants made by Congress to the state in trust to promote and secure the construction of certain lines of railroad, among others the Lake Superior and Mississippi Railroad, to extend from St. Paul on the Mississippi river to Lake Superior. The Lake Superior and Mississippi Railroad Company had been incorporated for this work, but had not entered on the construction, and it was at that time uncertain when the proposed road would be built or whether it would be built at all. The state, in order to secure the construction of this road, passed chapter 8 Special Laws of 1865, which reads as follows:

Section 1. That whenever any lands heretofore or hereafter granted to the Lake Superior and Mississippi Railroad Company, to aid in the construction or completion of its road or branches shall be contracted to be sold, conveyed or leased by said company, the same shall be placed upon the tax list by the proper officer for taxation as other real estate for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made, but in enforcing a collection of the taxes thereon, the title or interest of the said company or of any trustee or mortgagee thereof shall be in no wise impaired or affected thereby, but the improvements thereon, and all the interest of the purchaser or lessee therein may and shall, in case of default of the payment of taxes upon such land, be sold to satisfy the same, and it shall be the duty of the proper of-

ficers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes, and that the provisions of the several acts in relation to the taxation of the lands of said company so far as the mode of taxing such lands conflict with the provisions of this act, shall be and they are repealed. Provided, that said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March, in each and every year, pay into the treasury of the state, one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next, after thirty miles of said railroad shall be completed and in operation, and shall, during the seven years next ensuing, after the expiration of the three years aforesaid, pay into the treasury of this state on or before the first day of March of each and every year, two per cent of the gross earnings of said railroad, and shall, from and after the expiration of said seven years, on or before the first day of March, of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad; and the payment of such *per centum* annually, as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this state, on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the governor of this state, or any other person appointed by law to examine under oath the officers and employees of said company, or other persons; and if any person so

examined by the governor or other authorized person shall knowingly or willingly swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the state the payment of the aforesaid *per centum*, it is hereby declared that the state shall have a lien upon the railroad of said company, and upon all the property, estate, and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company.

Sec. 2. That upon the filing by said company in the office of the secretary of state of a notification of its acceptance of this act the same shall become obligatory upon the state and upon said company, provided that said notification shall be given within sixty days.

Sec. 3. This act shall take effect and be in force from and after its passage.

Approved March 3, 1865.

On July 2, 1864, the Northern Pacific Railroad Company was chartered by act of Congress to build a railroad from Lake Superior to Puget Sound, which would extend through the state of Minnesota. By section 17 of the Congressional Charter the company was authorized to accept "any grant, donation, loan, power, franchise, aid or assistance which may be granted to or conferred upon said company by the Congress of the United States or by the legislature of any state, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power, franchise, aid or assistance to its own use for the purpose aforesaid." By section 18 it was enacted that the company should obtain the

consent of the legislature of any state through which any portion of its road might pass previous to commencing construction. The company under its charter had a congressional land grant lying partly within the state of Minnesota, extending across the Northern part of the state from East to West. This land was public land of the United States at that time and had not been earned or acquired by the Northern Pacific company when the act of 1870 was passed.

In this condition of things the Legislature of Minnesota passed chapter 65 Special Laws of 1870, which reads as follows:

> Section 1. That the lands, franchises, property, stock and capital of the Northern Pacific Railroad Company shall be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and shall be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property and franchises of the Lake Superior and Mississippi Railroad Company, as is provided in and by an act entitled "An act in relation to the taxation of lands granted to the Lake Superior and Mississippi Railroad Company," approved March third, eighteen hundred sixty-five. *Provided, however,* That the gross earnings of said railroad company on which a percentage is to be paid to the state shall include only the earnings of that portion of the Northern Pacific Railroad constructed and operated by said company within the limits of this state.
>
> Sec. 2. That said Northern Pacific Railroad Company shall have the right and authority to acquire and hold lands for right of way, depot grounds, and for all necessary purposes of said company in all respects as provided by the general laws of this state, as set forth in

sections numbered consecutively thirteen to twenty-seven, inclusive, of chapter thirty-four, title one, of general statutes now in force. But where said company proceeds to condemn private property in more than one county in the same proceeding, the commissioners to be appointed shall be residents of the county where the property to be taken is situated, or of the county to which such county is attached for judicial purposes. And there is hereby granted to the Northern Pacific Railroad Company, the right of way through and over any lands of this state to the same extent as is granted by act of Congress through and over the public lands to said company.

Sec. 3. That whenever the Northern Pacific Railroad Company shall connect with or cross the route or line of any other railroad within the limits of this state and a portion of the routes or lines of said railroads shall be parallel or coterminous, such portions may by agreement of the companies interested therein, be blended in one track, or a double track and side tracks, and may be owned and used in common for such length of time and upon such terms as may be agreed upon by said companies, and said companies shall thereby be held to have complied with the requirements of their respective charters in that particular, the same as if independent tracks had been built by each.

Sec. 4. This act is hereby declared to be a public act, and shall take effect and be in force from and after its passage. *Provided,* Said Northern Pacific Railroad Company shall within ninety days from the approval of the same file with the governor a notice of the acceptance by said company of the terms and conditions of this act.

Approved March 4, 1870.

The Northern Pacific Railroad Company had been authorized to construct its road and exercise its franchises in the state of Minnesota by the act

of the Legislature of that state approved March 2, 1865 (Transcript, pp. 19-20). It filed an acceptance of the terms and conditions of the act of March 4, 1870, and thereafter constructed its road through the state of Minnesota in reliance thereon (Transcript, p. 20). The percentage of the gross earnings of said railroad provided to be paid by these laws has been duly paid by the Northern Pacific Company to the treasurer of the state of Minnesota each year (Transcript, p. 20). The bill of exceptions settled on the trial shows that the parties admitted these facts in the record (See Transcript, pp. 54-55).

The answer alleges that a certain parcel of land involved in this proceeding was a part of the said Congressional land grant of the Northern Pacific Railroad Company, and that the said act of the state of Minnesota approved March 4, 1870, and the acceptance of the same filed as aforesaid constitute a contract between the Railroad Company and the state, and asserts that the attempted repeal by the legislative act of 1895 without the consent of the company violates the obligation of said contract, contrary to the provisions of the constitution of the United States.

The controversy here before the court arises in this way: James N. Marr, a tax-payer of Aitkin County, Minnesota, represented by the Attorney General of the state, filed a petition in the name of the state for a writ of mandamus against Fred Stearns as County Auditor of Aitkin County, Minnesota, praying for a writ commanding Stearns as

County Auditor to place on the tax list of Aitkin County certain parcels of land (Transcript, pp. 4-6). The writ being issued, Fred Stearns as County Auditor answered, setting up that certain of the lands described in the petition were lands of the St. Paul & Duluth Railroad Company, certain of them lands of the Northern Pacific Railroad Company, and certain of them lands of the Great Northern Railway Company; the answer also pleaded the facts in each case upon which these lands were claimed not to be subject to the taxation attempted to be imposed. The answer is in the Transcript, pp. 10-24; the case was tried before the court, findings made and a bill of exceptions settled. The findings are Transcript, pp. 28-38, the bill of exceptions Transcript, pp. 39-56. A final judgment was awarded in the trial court granting a peremptory writ of mandamus as prayed (Transcript, pp. 38-39). Appeal was taken to the supreme court of Minnesota, where the judgment of the trial court was affirmed (Transcript, p. 70). This writ of error brings up the said final judgment of the supreme court of Minnesota.

ASSIGNMENTS OF ERROR.

1. The court below erred in holding and ruling that the said laws of March 3, 1865, and March 4, 1870, did not constitute a contract between the state of Minnesota and the Northern Pacific Rail-

road Company not subject to repeal or modification without the consent of the company.

2. The court below erred in holding and ruling that said Chapter 168, Laws of 1895, is not a law violating the obligation of the contract between the state and the Northern Pacific Railroad Company, and in violation consequently of the Constitution of the United States.

ARGUMENT.

1.

Whether the laws of 1865 *and* 1870 *were valid laws and constitute a contract is a question for this court and the decision of the state court is not binding here.*

At first sight it might be thought that the construction placed by the supreme court of a state on the constitution of the state being ordinarily binding on this court, and the laws of 1865 and 1870 in question having been held by the state court not to make a contract, because they were in violation of the state constitution, that that conclusion is also binding on this court. But while under ordinary circumstances this court will follow the decisions of the state court as to the construction of the laws and constitution of the state, that principle does not apply to a case where the very point

in controversy is that those laws constitute a contract violated by some subsequent state statute. In such a case this court must either abdicate its jurisdiction entirely or must decide for itself whether there is in the first instance a contract. Whether the obligation of a contract has been violated is a question arising under the constitution of the United States and within the jurisdiction granted to this court by the constitution and acts of Congress. In order to determine whether the obligation of a contract has been violated it is essential first to determine whether there was a contract. The one question necessarily includes the other. And when this court inquires whether a contract has been violated it must first determine for itself whether there was a contract. If in order to decide whether there was a contract the court must construe the constitution or laws of a state, the validity, scope and effect of those laws becomes a necessary part of the question. *Mobile & Ohio Railroad Co. v. Tennessee*, 153 U. S. 486, 492 and cases cited: *Jefferson Branch Bank v. Skelly*, 1 Black 436, 443.

II.

It has been held in this court from the beginning that a state may by contract to that effect, based upon consideration, exempt the property of an individual or corporation from taxation for any specified period or permanently; and that where an act

or charter contains an exemption in consideration that taxes shall be paid to a specified amount or upon a particular basis, this arrangement is presumed to be on sufficient consideration and consequently binding upon the state. *State of New Jersey v. Wilson,* 7 Cranch., 164; *Gordon v. Appeal Tax Court,* 3 How., 133; *State Bank of Ohio v. Knoop,* 16 How., 369; *The Jefferson Branch Bank v. Skelly,* 1 Black., 436; *University v. People,* 99 U. S., 309; *Asylum v. New Orleans,* 105 U. S., 362; *Pearsall v. Great Northern Ry. Co.,* 161 U. S., 662; *Mobile & Ohio Railroad Co. v. Tennessee,* 153 U. S., 486.

III.

That the said acts of 1865 and 1870 constitute contracts *in form* is plain. The act of 1865 was passed before the construction of the Lake Superior and Mississippi Railroad had commenced, before an acre of its land grant had been accepted or earned. It was part of the terms on which the company agreed to take the grant and to undertake the construction of the railroad. It provides in section 2 that upon the filing by the company in the office of the secretary of state of an acceptance of the act; the same shall be *obligatory upon the state and upon said company.*

The act of 1870, which applies the last named law to the Northern Pacific Railroad Company and

its land grant, is equally clear. It was passed before the Northern Pacific road had been commenced; before an acre of the land grant had been earned. In the record it is agreed that the road was constructed in reliance upon this act. The act applies to the Northern Pacific Company and its grant all the provisions of the act of 1865 in favor of the Lake Superior and Mississippi Railroad Company. Section 4 requires that the Northern Pacific Railroad Company shall within ninety days file with the governor "a notice of the acceptance by said company of the terms and conditions of this act." This acceptance was filed. These acts constitute a contract in form and were intended as a contract by the Legislature and by the company.

In the case of *State on Relation of Marr v. Luther,* 56 Minn. 156, the act of 1865 was considered and it was held to apply until the lands were sold contracted to be sold, or leased by the Railroad Company, the supreme court saying (p. 159): "The effect of this by necessary implication was that until sold, contracted to be sold, or leased, the lands were to be entirely exempt from taxation in the ordinary way."

This case is readily distinguishable from that line of authorities which holds that a mere gratuitous exemption by general law or special law, not based upon consideration and not amounting to a contract, is subject to repeal by subsequent legislation. Here the consideration of the law was the construction of the road, the acceptance of the

grant and the agreement to pay the gross earnings tax, all of which were undertaken by the railroad in reliance upon the law. Many millions of dollars have been expended by the Northern Pacific Railroad Company, perhaps without any income or return, in reliance upon the proposition of the State that the lands should not be taxed except through a payment of three per centum of the earnings of the road.

That the acts constituted a contract in form and that there was ample consideration for them has been decided over and over again by the supreme court of Minnesota. In the case of *First Division St. Paul and Pacific Company v. Parcher,* 14 Minn. (Gil. ed.) p. 224, the question was considered of similar acts passed in territorial times and the court said, on page 249:

> "In support of this ground of demurrer the defendants argue—*First*, that the taxing power is a sovereign power, and hence that it is not competent for a legislature to alienate or abridge it unless authorized so to do by the people. The charter granted in May, 1857, constituted a contract between the territory and the Minnesota & Pacific Railroad Company, one of the terms of which was that the lands granted in aid of the road should be exempt from taxation till sold and conveyed by the company. That the exemption thus conferred is a contract right—a right which a legislature, in the absence of constitutional inhibition, is competent to grant, and inviolable—has been settled in a series of decisions by the Supreme Court of the United States, so that the matter is not open to discussion. *State of New Jersey v. Wilson,* 7 Cranch. 164; *Gordon v. Appeal Tax Court,* 3 How. 133.

Again the court said, on page 251:

> "It is also urged by the defendants that the exemption from taxation was granted to the Minnesota & Pacific Railroad Company without consideration, and that, therefore, it does not come within the principle of the decisions of the federal supreme court before cited, but it is rather to be classed among the *privilegia favorabilia* spoken of in *Rector, etc., of Christ Church v. County of Philadelphia,* 24 How. 300, and may, therefore, be revoked at the pleasure of the sovereign. We are of the opinion that a sufficient consideration is to be found in the agreement of the company to construct the road, and to fulfill the other duties imposed by the charter, and among them to pay 3 per centum of the gross earnings of the road into the treasury of the territory or future state.

In *State v. Winona & St. Peter R. R. Co.,* 21 Minn. 472, the court by Chief Justice Gilfillan in considering the act of 1857 providing for payment of a gross earnings tax and exemption from other taxes of the lands until sold, said:

> "This is a contract between the state and the company and whether it is provident or improvident each must abide by it according to its true intent."

In *City of St. Paul v. St. Paul and Sioux City Railroad Co.,* 23 Minn. 469, 475, referring to the act of 1857, granting lands to the Root River Valley & Southern Minnesota R. R. Co., as amended by the act of 1864, the court says:

> "This modification of the original contract was prohibited by no provision of the constitution; and the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since, as valid, by

both the executive and legislative departments of the state government, but, by an express constitutional amendment adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by a vote of the electors of the state."

In *St. Paul and Chicago Ry. Co. v. McDonald*, 34 Minn. 195, 209, the court by Justice Mitchell in regard to a similar contract says:

> "The state should and must in letter and spirit, religiously keep its contract obligations; but the law will not tolerate the use of mere forms to evade its spirit."

In *County of Stevens v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 36 Minn. 467, the court said:

> "For the prior enactment embodied the elements of a contract between the state and the corporation which had been in force and acted upon both by the state and by the company for many years, and its annulment by the act of the state alone was impossible under the federal constitution."

It is not out of place to call the attention of this court to the history of the taxation of land grants in Minnesota as stated by the highest court of that state in the Parcher case. On page 253 the court said:

> "In addition to what was there said, it is entirely proper for us to refer to the state of things existing when the policy to be adopted was under consideration by the legislature. The state was then almost a wilderness. Its population was small and sparse, its capital limited, its business depressed, its resources undeveloped. There was not a mile of railroad within its borders. An outlet by rail for the

> products of the state was a matter of prime and pressing necessity. The inducements which we were able to hold out to secure this outlet and the construction of needed lines of railway consisted rather in what the state was to be than in what it was. The country at large had hardly recovered from the financial revulsion of 1856-7. How soon the railroads in this state would prove remunerative to their owners, as well as how soon the lands would sell, were matters of conjecture and experiment. And notwithstanding repeated and continued tenders of all the roads, lands and franchises, together with the privileges and exemptions in regard to taxation, it was not until the summer of 1862 that the first ten miles of railway were put in operation in this state. These facts are not without weight in considering whether the grants of lands, without the exemption from taxation, would probably have induced capital to undertake the construction of the roads, especially when we take into account the proverbially high rates of taxation in newly-settled communities."

Again, in the case of *City of St. Paul v. St. Paul and Sioux City Railway Company,* 23 Minn. 471, the same court said:

> "It is a part of the legislative history of the state that its policy in regard to the taxation of this and the other land-grant railroads, so-called, was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state and every portion thereof so far as possible an ultimate and adequate return for the value of the franchises conferred, including this immunity from taxation. It is also a part of this well-known history that in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act among the four

original land-grant companies in 1857, the then territory (now state) adopted a distinct and special policy of taxation in reference to those companies and the lines of road which they were authorized to build, looking to the early completion of these lines, and the just rights and interests alike of the companies, the state at large, and all localities therein. This policy contemplated as a basis of taxation the annual gross income or earnings of the companies, instead of an *ad valorem* assessment or valuation of their franchises and property; and, instead of a general and local system of taxation, the payment of a fixed per centum of their annual earnings into the state treasury for the benefit of the whole state was provided for in lieu of all taxes whatsoever. This, it was supposed, would prove less vexatious and burdensome to the companies, especially in the infancy of their existence; ultimately more advantageous and productive to the revenues of the state, and clearly more just and equal to all localities therein, as all would share equally in the benefit to accrue from taxes raised and contributed on account of property held under franchises derived from the whole people. Experience is fast demonstrating the wisdom of this policy and realizing the expectations of its founders."

That these acts constitute a contract (provided the acts were valid laws) is not doubtful under the decisions of this court. *Pacific Railroad Co. v. Maguire*, 20 Wall. 36; *Farrington v. Tennessee*, 95 U. S. 679.

IV.

The constitution of Minnesota, adopted in 1858, *sections* 1 *and* 3 *of Article IX, have no application to the property in question.*

Passing for the present any consideration of the proper construction of these constitutional provisions, the fact must be admitted that they have no application to property conveyed by the United States to the state in trust to aid works of internal improvement, nor to lands of the United States. Such property could not be taxed by the state in any event. The state cannot tax the lands of the United States. The constitutional provisions relate to *private* property only and must be read as if this qualification were written in them.

When the laws of 1865 and 1870 in question were passed the lands involved in this suit now belonging to the Northern Pacific Railroad Company were property of the United States, and the lands involved in this suit belonging to the St. Paul and Duluth Railroad Company were lands conveyed by the United States in trust to the state of Minnesota to aid the construction of a railroad from the Mississippi river to Lake Superior. At that time the constitutional limitations on legislative power of Article IX had no application to either class of lands. Such lands passed into private ownership with the privilege of commuted taxation created with respect to them and impressed upon them

while they were yet public lands. The history of the transaction as shown in the quotations before made in the opinions of the supreme court of Minnesota is, that when these laws were passed the state was almost a wilderness, its population small and sparse, its capital limited, its business depressed, its resources undeveloped. In 1865 there were very few miles of railroad within its borders. An outlet for the products of the state was a matter of prime and pressing necessity. The state had not succeeded in spite of repeated and continued offers in securing the construction of railroads. It was not until 1862 that the first 10 miles of railway were built in the state. We are authorized to infer, as the supreme court of Minnesota has said, that without the offer of the contract in question capital could probably not have been induced to undertake the construction of the roads, at least for years to come, and that the state received in the contract a fair and full equivalent for all future taxes.

These lands were not subject to taxation so long as they remained public lands. They could not be taxed until after they passed into private ownership. So long as they remained public lands they were not subject to the taxing power of the state nor to the limitations on that power expressed in Article IX of the constitution. These limitations are not more extensive than the taxing power itself which they limit. That power and the limitations apply to private property only. Now, in order to get a private corporation to build a railroad the

state found it necessary to make a certain contract; it accepted the construction of the road and perpetual payment of three per cent. of its gross earnings to the state and granted in consideration thereof freedom from any other form of taxation until the lands were sold. Thereby the right, immunity or privilege to pay taxes by a percentage of railroad earnings was impressed upon the land while it was yet public property. Subject to this privilege or immunity it passed into private ownership. The immunity attached to the title before the company accepted or earned the lands. The constitution of the state cannot be held to have intended to prevent the state from making such bargains as to its own public domain, or as to government land within its borders, if it found such contracts reasonable and necessary to secure works of internal improvement. And whether such contracts were reasonable or necessary is a question which was settled by the Legislature.

This argument was pressed upon the supreme court of Minnesota and was overruled (72 Minn. pp. 223-4). But it is evidently a question for this court to determine whether the contract of a state with respect to the public domain of the United States, or with respect to land of the United States of which the state is trustee, made with respect to lands which were not subject to the taxing power of the state, or to its constitutional provisions touching taxation, by means of which contract the state has induced private owners to take the lands and the benefits of which contract the state has

received and retained for 30 years, can be held no contract because of provisions in the state constitution; which provisions it is urged have no application to the property or to the contract in question. And the argument we make is supported by authority. The decision of the court below on this point is, so far as we know, supported by no authority and none is referred to by the state Supreme court.

(a) *Our contention is we think sustained by the Parcher case*, 14 Minn. 297. In that case a franchise, land grant and right to pay taxes by gross earnings connected therewith, granted before the adoption of the constitution, became forfeited to the state after the constitution was adopted, and was re-granted by the state to the First Division St. Paul & Pacific Railroad Company. This re-grant was after the constitution was adopted. The case was one therefore where a land grant and franchise to build a railroad coupled with a per cent. gross earnings provision, which had been made by the territory before the admission of the state, being forfeited and falling back into the hands of the state, *a new grant* was made by the state legislature to a new corporation after the adoption of the constitution, which grant professed to convey intact the franchise, land grant and immunity from ordinary taxation in consideration of a gross earnings payment. The constitutionality of this re-grant being attacked as invalid under the constitution of 1858, the court after elaborate considera-

tion held that the legislature had power to make the contract. This decision can only be supported on the theory which we advance, that the provisions of the constitution had no application to a grant and contract made by the legislature with respect to the public domain. It is true the main attack in that case and the main argument in the opinion of the court is based upon other provisions of the constitution. But the court held that the grant was constitutional, including the privilege of commuted taxation, and the decision must be held therefore to have settled that the grant was valid notwithstanding the provision in the constitution as to uniformity of taxation. This decision was made in 1869. It was a noted case and became at once a recognized rule of property and is the foundation on which rests a large part of the railroad and land grant investments within the state of Minnesota. It has always been followed. The legislature the next year thereafter passed the act in question applicable to the Northern Pacific Railroad grant and there cannot be a doubt that the Minnesota courts, legislature, executive, and people, as well as the railroad companies, then considered the Parcher decision as settling the validity of such legislation. It is a rule well founded in justice and authority that the law as then settled must control as to the validity and effect of the contract and that this court will apply that law, ignoring a later decision of the state court which would have the effect to violate the contract. *Havemeyer v. Iowa County*, 3 Wall. 294; *Gelpcke v. City Dubuque*, 1 Wall. 175;

Chicago v. Sheldon, 9 Wall. 50; *Olcott v. Supervisors,* 16 Wall. 678; *Louisiana v. Pilsbury,* 105 U. S. 278, 294. It will be noted that in this case the state court gave effect to a subsequent *statute* of the state repealing law constituting the alleged contract and the case is not therefore controlled by *Bacon v. Texas,* 163 U. S. 207, and cases there cited.

(b) *Our contention is sustained by the decisions of other courts.* In *Illinois Central Railroad Co. v. The County of McLean,* 17 Ill. 291, public lands had been granted to the Illinois Central Railroad Company under a contract that they should be taxed by the railroad company paying a percentage of its gross earnings into the state treasury, and taxed in no other way. The validity of this contract was challenged upon provisions of the Illinois constitution more or less similar to those in question contained in the Minnesota constitution. But the court said (p. 296):

> "The case before us is not an exemption or immunity from the payment of taxes. Nor do I hold to a power to discriminate and exempt the owners of the same kinds of property provided to be taxed, or a change of the rule of valuation and assessment. But the exemption of the donated lands may be regarded as an exemption of the *public property until its sale, or the performance of the conditions which will release the lien of the state.*"

In the act of 1865 in question is contained a provision that the state shall have a lien upon the railroad and all the property of the company to secure to the state the payment of three per cent. an-

nually of its gross earnings, and that such lien shall take precedence of all demands, decrees and judgments against the company. A similar provision was in the grant to the Illinois Central Railroad Company considered in the County of McLean case. In a separate opinion in that case by Skinner, Judge, p. 298, that Judge concurred in the majority opinion on the ground that the land was public property not subject to taxation; and the retention of a lien on it by the state removed it entirely from the provisions of the constitution providing for uniformity of taxation.

In the case of *People v. Auditor General,* 7 Mich. 84, the court considered a case where land had been granted to the state by the national government for the construction of a canal. The grant was accepted by the state and a contract was entered into by the state with the canal company stipulating for the remission of taxes on the granted lands for the period of five years. This remission of taxes was challenged as being contrary to the rule of uniformity of taxation provided for in the constitution of Michigan. But the court said (pp. 89-90):

> "It is evident from a consideration of these acts that the land was never a part of the public domain of Michigan, either by grant from Congress, or by sale to a purchaser, before the passage of the act in question, so that the right of taxation had accrued to the state. It was granted to the state for the specific purpose of being applied, either by sale or appropriation, to the purposes of the construction of the canal. As such, it assumed the character of a fund, to be expended under the direction of the state; and so the legislature evidently regarded

it, and that the state held such land only as trustee for the accomplishment of that purpose."

"Instead of selling the lands, and appropriating the avails towards the construction of the canal, the legislature found it desirable, if not necessary, to appropriate the lands themselves. From the course of legislation we may presume that this appropriation of the lands, was found to be insufficient of itself to induce any one to undertake the work, and that in order to render it sufficient, the state authorized the contract for the remission of the taxes thereon. This authority was given, and the contract executed, while the lands were in a condition in which they could not be taxed, and until such right of taxation had accrued to the state, it was not within the scope of either its constitutional or legislative provisions. The state had power to contract with the company to convey the lands after five years, and thus relieve them during that period from taxes, and if it might do this, it is difficult to find a reason why it might not so convey them as to secure the same exemption from taxation. In making this contract the state acted as the trustee of the general government; in the law authorizing the contract, it was dealing with the subject of the trust, over which no right of taxation then existed."

The character of these lands and how they differ from ordinary private property was well explained in the opinion of Mr. Justice Peckham, in *McHenry v. Alford*, 168 U. S. 651, 665-668.

This question may be illustrated by reference to three classes of lands; (a) lands like those of the St. Paul and Duluth, granted by congress to the state in trust, (b) lands of the United States like the lands of the Northern Pacific herein, (c) pub-

lic domain of the state like school sections and swamp lands.

First, as to lands granted by congress to the state in trust. Such lands need not have been conveyed to a railway company at all. The trust defined in the act of congress was "to aid the construction" of a certain railway. The state was left to pass such law as might be found advisable, fixing the manner of the execution of the trust. As said by the supreme court of Michigan in the case above cited, the state might have contracted to convey the lands to the company after the expiration of a term of years, during which term they would not have been taxable; and indeed the state might have enacted that it would retain itself the title to the land and sell them, turning over the proceeds to the railway company. Under any such condition the lands would have remained untaxable. But the state saw fit on considerations of convenience and general benefit to convey the lands immediately to the railway company and allow it to dispose of them. No good reason we think can be advanced why, if the lands could have been held by the state untaxable the trust title cannot be vested in the company by contract, with the provision that they shall be in that condition untaxable, or taxable only in a certain manner.

Second, as to lands of the United States, like those of the Northern Pacific here in question. The state had under the charter of the Northern Pacific Railroad absolute veto power on the construction of the road through Minnesota and on the acquisi-

tion of these lands by the company. This absolute power included the right of the state to have given a conditional consent and to have said to the company, that it might construct its road through Minnesota in consideration of releasing or conveying to the state its land grant within the state; either on terms that the proceeds of such land should be turned over, as the lands were sold, to the company, or that they should be devoted to any other purpose of the state. If such condition had been imposed and consented to by the company, that would have made a contract within the power of the state to make. Now, instead of saying this the state said to the company, you may build your road and take the title to these lands from congress in consideration of your paying to the state three per cent. of the gross earnings, the lands to be taxable in no other manner.

Third, take the case of public lands belonging to the state. Suppose they can not be sold upon ordinary terms and conditions; suppose unless inducements are offered they must forever remain the property of the state and untaxable; suppose the state finds it necessary in order to get private owners to accept them to make certain contracts with respect to taxation; this may be considered either with reference to strictly private property of the state sold for private purposes, or to public lands conveyed to an educational or other public institution created by the state.

In any of these cases it is taking an extremely narrow view to say that the state has no right to

make a *bona fide* contract under which it gets the full benefit of taxation, under which it receives a full *quid pro quo*; and this case must be considered as if the state did receive a full *quid pro quo,* because we are discussing the power of the legislature, not the wisdom of its contract. In any of the cases supposed the state is not bargaining away any present right which it has to tax the lands. It is parting with nothing. Rather it is providing for the creation of new property which would not otherwise come into existence, and in consideration of such new property being created by a private owner the state bargains for and receives a large benefit. The case is not distinguishable from that which has been frequently passed on by this court with respect to which this court said in *Jefferson Bank v. Skelly,* 1 Black, 436, 446:

> "This court has also decided that the charter of a bank is a franchise which is not taxable as such, if a price has been paid for it which the legislature has accepted with a declaration that it shall be in lieu of all other taxation."

See also *State of New Jersey v. Wilson,* 7 Cranch 164; *Gordon v. Appeal Tax Court,* 3 How. 133.

It must not be forgotten that the state is a sovereign. It has power to grant charters and franchises, and to make contracts. No provision of the constitution restricts in terms its power to *contract.* It is not reasonable to infer a restriction of that power from a constitutional provision that taxes shall be levied uniformly on all property at its true value. Can such a provision be held to for-

bid a contract by which the legislature secures a full equivalent for taxes?

V.

The alleged contract was acted on in good faith and executed. It has been treated as valid by all departments of the state government for thirty years and was never attacked until the passage of the act of 1895. *This long practical construction, the long continued payment of the gross earnings percentage, with the investments which have been made in the state, forbid that this construction should now be changed to the detriment of vested rights.*

Without considering for the present whether the court below is correct in its interpretation of the state constitution as an original question, we wish to explain the history of legislation in Minnesota and show the *practical* construction which the constitution has received from all departments of the state government; and also to state in a general way the vested rights which have accrued in reliance thereon.

The system of providing for taxation of railroad lands through payment of a percentage of the gross earnings of the road in lieu of other taxes was universally in vogue in Minnesota in territorial times, and after the admission of the state and the adoption of the constitution in 1858 the Legislature invariably assumed that it continued to possess the

same power, whether the railroad grant was the absolute property of the state or was public land of the United States. This was the practice not only as to old grants adopted before the constitution, but also as to new grants both state and congressional made after that date.

In the case of *First Division of St. Paul & Pacific Railroad Co. v. Parcher,* 14 Minn. 224, the court considered the question of territorial grants made before the adoption of the constitution and held that where such franchises and grants had been forfeited and reverted to the state it was competent for the state to hold them with the railroad and property connected therewith without merger or extinguishment, and to transfer them over after the adoption of the constitution to another company with all the original immunities and privileges as to taxation, without such transfer being in violation of the constitution theretofore adopted. The Parcher decision has been repeatedly followed in the supreme court of Minnesota and has become the settled law of the state. See *County of Stevens v. St. Paul, Minneapolis & Manitoba Railway,* 36 Minn. 467, and cases cited in the opinion on page 470. The major part of the railroad lands in Minnesota was granted under territorial grants and come under the rule of the Parcher case and the authorities following it. All such territorial grants are valid contracts and cannot be affected by the act of 1895 in question.

To show the course of legislation on this subject

after the adoption of the constitution, we cannot do better than to quote from the opinion of the supreme court of Minnesota in *State v. Luther,* 56 Minn., pp. 163-4:

> "Among the congressional grants made subsequently to the adoption of the constitution to aid in the construction of railroads in this state, are the act of March 3, 1865, (13 U. S. Stat., p. 526), increasing the grant of 1857 to ten sections per mile; the act of May 5, 1864, (13 U. S. Stat., p. 64), making a grant to aid in the construction of a road from St. Paul to Lake Superior; the act of May 12, 1864, (13 U. S. Stat., ch. 84, sec. 7, p. 74), granting four additional sections per mile to aid in the construction of a road from St. Paul and St. Anthony to the southern line of the state; the act of July 4, 1866, (14 U. S. Stat., p. 87), making a grant to aid the construction of what is called the Hastings & Dakota Railroad; the act of July 2, 1864, (13 U. S. Stat., p. 365), making a grant directly to the Northern Pacific Company to aid in the construction of its road.
>
> "Among the grants made by the state itself for like purposes were that of March 6, 1863, (Sp. Laws 1863, ch. 4), of swamp lands to the St. Paul & Pacific Company to aid the construction of a road from St. Paul to Winona; the act of February 16, 1865, (Sp. Laws 1865, ch. 1), granting swamp lands to aid the construction of the Southern Minnesota Railroad; the act of March 8, 1861, (Sp. Laws 1861, ch. 1, sec. 18), making a grant of swamp lands (to which the lands here in controversy in part belong) to aid in the construction of the road from St. Paul to Lake Superior.
>
> "And in every instance the legislature, in making or transferring the grant to the railway company, provided for the exemption of the lands from ordinary taxation while owned by the company, in consideration of its pay-

ing to the state, annually, a certain percentage of the gross earnings of the road. They provided for the same system of taxation for the Northern Pacific Company, which received its grant directly from congress. Sp. Laws 1870, ch. 65, sec. 1.

"In brief, the legislature assumed that when making a grant of lands to aid the building of a railway, or in executing the trust where lands had been granted to the state by congress for the same purpose, (and which, while thus held by the state, either as proprietor or in trust, were, of course, not subject to taxation), it had the power, in the furtherance of the object for which the grant was made, to exempt such lands from ordinary taxation, and to provide for commuted taxation of both the railroad and the granted lands.

"There is not in the history of the state a single grant of lands to aid the building of a railway, where this system of commuted taxation has not been adopted, and we have not found an instance, prior to the adoption of the constitutional amendment of 1871 (Const., Art. 4, sec. 32a,) where a commuted system of taxation was provided that did not apply to a land grant as well as to the railroad property. This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight."

The same class of legislation was extended to other subjects besides railroads and railroad land grants. In the first tax law passed after the adoption of the constitution (chap. 1, Gen. Laws 1860) the legislature in section 2 made a provision by which the tax payer could off set against the assessment of credits any indebtedness which he might owe. Although this provision would be unconstitutional according to a technical and literal reading

of section 3, article IX *supra*, and had been so decided in Ohio before we adopted the section (*Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1) it has always remained a feature of the tax laws of Minnesota. It has been in force and universally acted upon for 39 years. And in *State v. Moffett*, 64 Minn. 292, the constitutionality of the act being challenged, the court declined to consider the subject upon its merits, or to indicate what conclusion might be arrived at if the question were an open one, saying:

> "We regard the point submitted as foreclosed by the practical construction which has been placed upon sections 1 and 3 of article IX for almost 40 years, really during the entire period of statehood, by the legislative, executive, and judicial branches of the state government."

The court goes on to show that in 1860 such a provision was introduced into the tax law, where it has always remained. In 1864 the attorney general of the state rendered an opinion that the law was unconstitutional, but notwithstanding this opinion the executive department of the state has always recognized the validity of the law, the legislative department has gone on the theory that it was valid, and it had silently been taken for granted in the judicial department; and that in this construction the people of the entire state had acquiesced for nearly two score years.

It thus appears as if in the state court 40 years of practical construction is sufficient to make valid one class of legislation; and not sufficient to make valid another class of legislation, the objection being the

same against both and the practical construction being the same in both cases. There is really no difference between the two cases except the inclination and desire of the state court to hold one piece of legislation valid and the other piece invalid.

In 1872, amended in 1876, the legislature of Minnesota passed an act for the taxation of insurance companies by a percentage of the premiums in lieu of other taxes on all real and personal property (see Gen. Stats. 1878, sec. 315, p. 433). Taxation of insurance companies by the same method has prevailed ever since without question and goes on in the state of Minnesota today.

Mining companies were taxed under the law of Minnesota according to the tons of ore mined, and this was held unconstitutional in the case of *State v. Lakeside Land Co.*, 71 Minn. 283. But there had been no such long practical construction of the law as to mining companies. The law was a general law. There was no question of contract involved, the law not taking the form of a contract and no investment having been made in reliance thereon. And moreover, the tons of ore mined is no sort of criterion to the value of a mine, as the earnings of a railroad are a criterion of the value of a railroad. This last suggestion will be further considered under the next point.

Thus we have in Minnesota a system of railroad taxation of 40 years' standing, a system of taxation of credits nearly as old, a system of taxation of insurance companies 25 years old, the validity of which has passed unquestioned until quite recent-

ly. Not only the legislature, but the executive, the courts and every branch of the state government, and the people themselves, have during all these years considered this legislation as valid. The controlling force of a long continued practical construction of this sort is held in a line of decision in the supreme court of Minnesota, *Carson v. Smith,* 5 Minn. (Gil.) 61; *Green v. Knife Falls Boom Corp.,* 35 Minn. 161; *City of Faribault v. Misener,* 20 Minn. (Gil.) 352; *Ames v. Railroad Co.,* 21 Minn. 288; *State v. Moffett,* 64 Minn. 292; *State v. Luther,* 56 Minn. 156, 162.

The cases are also numerous in this court where it has been held that co-temporaneous interpretation of the constitution practiced and acquiesced in for years conclusively fixes its construction. *Stuart v. Laird,* 1 Cranch. 299; *Martin v. Hunter,* 1 Wheat. 304; *Cohens v. Virginia,* 6 Wheat 264; *Cooley v. Port Wardens,* 12 How. 299; *Burrow-Giles Lithographic Co. v. Sarony,* 111 U. S. 53; *The Laura,* 114 U. S. 411.

As the court forcibly put the matter in *U. S. v. Burlington Ry. Co.,* 98 U. S. 334:

> "Such has been the uniform construction given to the acts by all the departments of the government. Patents have been given, bonds issued, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

As shown by the opinion of the Minnesota su-

preme court in *State v. Luther,* the provision here claimed to be unconstitutional has been incorporated into every railroad grant ever made in Minnesota. These grants have been accepted in good faith and enormous sums of money have been invested in reliance thereon. It appears in the record that the Northern Pacific Railroad was built through the state of Minnesota (about 250 miles) in reliance thereon, built it is not unreasonable to assume long in advance of the possibility of profitable operation; years ahead of the time when it would have been built except for that and similar inducements. The state has been populated, its interests developed, its property made valuable by the construction of this and other railroads, and investors cannot now be put in *statu quo;* the state cannot refund what was invested in reliance upon a construction of the constitution which the court now says 30 or 40 years afterward was incorrect. The roads have during all these years paid into the state treasury three per cent. annually of their gross earnings, state and inter-state, though the power to tax interstate earnings is and always has been doubtful (*McHenry v. Alford*, p. 670). The state does not propose to refund. And the law of 1895 continues the obligation to pay the same gross earnings assessment. Negotiable bonds have been issued secured by mortgages on these railroads and have been dealt in by the commercial world in reliance on the validity of these contracts, and their validity was never challenged until in the year 1895, when the legislature passed the tax act in question.

Not only should this court follow its own judgment as to the constitutionality of the laws of 1865 and 1870, but considering the long practical construction and the large investments in reliance upon that construction, the case falls within the reason and principle of those decisions of this court, which have held, that, where when contracts are made the law of the state as interpreted by its courts is in favor of their validity, a subsequent decision of the state court to the contrary will not be followed in this court; *Gelpcke v. Dubuque,* 1 Wall. 175; *Thomson v. Lee,* 3 Wall. 327; *Mitchell v. Burlington,* 4 Wall. 270; *The City v. Lamson,* 9 Wall. 477; *Douglass v. Pike,* 101 U. S. 677.

VI.

As to the true construction of sections 1 *and* 3, *article IX of the state constitution.*

Section 1 does not differ from the provision in the organic act of the territory of Dakota, which was construed by this court in *McHenry v. Alford,* 168 U. S. 651. The organic act provided that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

This language in the organic act of North Dakota contained two prominent limitations on legis-

lative power; first, that taxes should be uniform, second, that they should be in proportion to the value of the property taxed. The organic act therefore contained all the provisions of sections 1 and 3, article IX, of the Minnesota constitution, except the one provision of article III to the effect that laws shall be passed taxing all property.

This court held in that case that there was nothing in this provision of the organic law which prohibited the legislature from passing a gross earnings law under which the railroad company paid a percentum of its gross earnings in lieu of all other taxes on the railroad and land. The case, therefore, decides (a) that such taxation is not contrary to the rule of uniformity; (b) that it is taxation *in proportion to value.* So far as the opinion of the supreme court of Minnesota in this case (72 Minn. 22) holds that the act of the legislature violates the constitutional rule of uniformity, or so far as it holds that the taxation in question is not based on value, it is contrary to the decision of this court in *McHenry v. Alford,* and contrary to the authorities which this court cited with approval, 168 U. S. 699. And when the state court says that a state could not *contract* it runs counter to the settled rule in this court which we have before referred to, that a state can make a contract on the subject of taxation.

The decision of the state court may rest partly also upon that part of section 3 which says, "Laws shall be passed taxing *all* moneys," etc., and also, "*all* real and personal property according to its true value in money." Under section 1, standing

alone, it is clear and has been decided by this court in *McHenry v. Alford,* that it is for the legislature to decide upon what property taxes are to be levied, and that the legislature may classify and arrive at the value of different species of property in different ways: it may for example tax improved property by per centage on rental or income, unimproved property directly by ascertaining its value.

Section one says, therefore, that the legislature may select the property which is to bear the burden of taxation and need not levy taxes on all property. If section 3 is to be read literally and strictly so as to compel the passage of laws taxing absolutely *all* property, it conflicts with and is contradictory of section 1.

But the two sections stand in the constitution together as both operative and as modifying each other. Some construction must be adopted which will give the fullest effect to both.

It may be pertinently pointed out that section 3 is not self-executing but is directory to the legislature. It says that laws shall be passed, etc. Suppose the legislature fails to pass any law taxing mortgages, for example, it could not be contended that mortgages were taxable. Neither, we apprehend, would a court decide that all the taxes assessed in the state were void because the legislature had not passed a law taxing mortgages. *State, Vail's Exrs. v. Runyon,* 41 N. J. Law. 98. And therefore it may well be held that section 3 was not intended to overrule section 1 so far as concerned the power of the legislature to determine

where the burdens of taxation should be placed (of course, without unjust discrimination) and to classify property into different classes for the purposes of taxation.

Take, for example, a railroad; it has no market value; there are no purchasers; so much money may be invested in it that no person or aggregation of persons would furnish the capital to buy it. Yet it has a value as a system or entity which can best be determined by its earning capacity. The same is true of the property of any corporation which is incapable of separation from the corporate franchises with which it is used, the whole constituting a taxable entity with a value depending on earning capacity, or at least which the legislature *may* determine by earning capacity. And the legislature is not confined to taxing such property by direct assessment of such part thereof as is tangible and has an ascertainable market value. *McHenry v. Alford*, p. 665-668; *Adams Express Co. v. Kentucky*, 166 U. S. 171; *Adams Express Co. v. Ohio State Auditor*, id. 185.

Mr. Morawetz, in his work on Corporations Section 929 says:

> "In speaking of the value of franchises, care must be taken to distinguish between the different meanings of the word "value." One meaning of the word is *price*, or the amount for which a thing can be sold. In this sense franchises have clearly no value whatever, because, by their nature, they are not transferable. They cannot be sold, or leased, or mortgaged, nor can they be taken on execution. On the other hand, franchises clearly have a value, if the word "value" is used to signify the ad-

> vantage derived from their possession, or, in other words, their *utility*. The value of a franchise, using the word "value" in this sense, would not be measured by the cost or difficulty of obtaining the franchise, or by its exclusive character, but by the benefit derived from its possession."

The determination of value by rental or income can not, we submit, be held not to be a constitutional assessment according to value. It is an elementary principle of political economy that rental or earning capacity is one of the very best tests of value. And in order to hold that taxation of a railroad by an annual percentage of gross earnings is not taxation of the property according to its value, the court must overrule this fundamental principle and say that earning capacity may not be taken as a test of the value of property difficult or impossible to determine directly. The court must hold the very narrow view that no appraisal is based on value, except the ordinary direct and specific assessment of value; when we all know, as a fact, that as to all property operated under and with franchises earning capacity is the best index of value.

If this is true with respect to taxation of railroads it is true of the taxation of these land grants as a single entity with the railroad. These grants were universally granted to aid in the construction of some railroad. Take the Northern Pacific grant as an example. Its lands were granted by section 3 of the act of July 2, 1864. "For the purpose of aiding in the construction of said railroad and tele-

graph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores." The lands were held upon a trust created by act of Congress for the purpose of aiding the construction of the railroad. Neither the lands nor their proceeds could lawfully be applied or used for any other purpose whatever. While held on this trust they could not be made productive; they could not be built upon cultivated, improved, and made a source of income to the company; they were necessarily held for sale, the proceeds of sale to be devoted to railroad purposes strictly, and to paying off mortgages, the money raised upon which had constructed the road. The lands could not be sold and the proceeds appropriated by the stockholders in the way of dividends or otherwise. They are wedded to and inseparable from the railroad itself. Without them coupled with the commuted taxation, the road might not have been built. The railroad earnings are produced partly by the lands, because the value of the lands has already been borrowed thereon and put into the road; the lands are and must continue to be held to aid the road and enable it to produce earnings. *McHenry v. Alford,* pp. 660, 661, 662; *State v. Luther,* 56 Minn. 156.

The supreme court of Minnesota has held in repeated decisions, as this court held in *McHenry v. Alford,* that the commuted system of taxation in question was not an exemption. In *City of St. Paul v. St. Paul & Sioux City Railroad Co.,* 23 Minn. 469, the court said that the statute did not release the

corporate grantee from any portion of its just and equal share of taxation in respect to any of its property, but merely provided a mode of commutation therefor based upon a percentage of earnings or income agreed upon as a just equivalent equally advantageous and beneficial to the state (p. 471). We are not, therefore, asking the court to hold that the Minnesota legislature could exempt any property from taxation except that especially enumerated in section 3 *supra*. We can safely concede that it is the duty of the legislature under the constitution of the state to tax all property at its value in money. But here we have a kind of property which is *sui generis*, consisting of a franchise, with a land grant devoted to the purpose of building a railroad; the whole consisting of one entity, upon which it would be difficult—if not impossible—for any person to put a direct value in money. Instead of trying to do so the legislature has said that the whole shall be assessed each year by taking 3 per cent. of the gross earnings. Under this system, as the earnings increase taxes increase, and it is fair to assume that as value increases earnings increase. It cannot be said that this property is not taxed, neither can it be said that it is not taxed in proportion to its value. All that can be said is that the value is ascertained indirectly instead of directly. But it was for the legislature to fix the *method* of ascertaining value. There is nothing in the constitution which provides that value shall in all cases be fixed by a direct determination by an assessor, and if the *method* of

taxation here in question may be regarded as resting on *value* the selection of such *method* of arriving at value is purely a legislative question. Plainly it may be the case that this property has and would continue to pay substantially the same, or at least as much taxes, under the gross earnings system as under the other system. We believe railroad experience has shown this to be the case, but whether this is true or not the crucial question is whether the court can judicially know that this taxation has not been in proportion to value; or whether on the other hand this is not purely a legislative question.

The utmost that can be claimed by the learned attorney general is that there are three important requirements as to taxation in the Minnesota constitution; first, that laws must be passed taxing all property; second, that taxation shall be based on value; third, that it shall be uniform.

As to the first requirement, we have shown that this property is taxed.

As to the second requirement, that taxation shall be based on value, we do not think it can be controverted that the taxation in question is based on value, and it has been so decided by this court in *McHenry v. Alford.*

As to the question of uniformity, it was decided by this court in *McHenry v. Alford,* that the taxation in question was not contrary to the requirement of uniformity. The only refuge of our opponents is to say, that while the taxation in question might be uniform for one year, its uniformity is de-

stroyed because the legislature has fixed the rate of taxation for a considerable number of years, or so long as the company holds the lands unsold. The learned attorney general will, we think, be driven to concede that the property is taxed and that it is taxed on value; that the rule of uniformity is not violated unless it be on account of the rate of taxation being fixed for a considerable period. And this is the point to which the case is ultimately reduced as shown by the recent opinion of the supreme court of Minnesota (unreported) in *County of St. Louis v. Duluth and Iron Range Railroad Company,* where the court says:

> "True, these lands were conveyed for a public purpose and it may be conceded that in the absence of constitutional provisions prohibiting it, the legislature might in aid of such purpose have granted the lands exempt from taxation. But we are of opinion that under our constitutional provisions requiring uniformity of taxation, the legislature cannot, even in aid of a public purpose, make an irrevocable contract exempting private property from future taxation, because, even if it is admitted that thereby the legislature did nothing more than anticipate such future taxes and apply them in advance to a specific public purpose, still, it is impossible for the legislature to tell at present what in such a case will be uniform taxation in the future, or that by such arrangement such property will bear its just and equal share of such future taxation."

There are two answers to this argument.

First, the legislature is not confined by the constitution to fixing a new rate of taxation every year. Neither is there, as we think, any provision

in the constitution which requires that the legislature shall fix the rate on *all* property at the same time or for the same term. May not the legislature fix the rate on land for five years to come and leave the rate on personal property to be fixed annually? Would that be contrary to the rule of uniformity? It must be remembered that the legislature is vested with all the power on this subject except as it is limited by express constitutional limitation. General legislative power rests in the legislature and it may fix the valuation and rate itself, or delegate such fixing to subordinate bodies. The legislature must be the judge (unless it is expressly deprived of that power) as to whether fixing the rate of taxation with respect to a certain class of property for a considerable term violates the rule of uniformity, because the rate on other classes of property is fixed annually or bi-ennially. How can the court say that thereby less taxes are collected against the property for which the rate is fixed for a considerable period? In fact all the legislature has done is to classify; the classification rests on reasonable grounds, and so far as appears all members of the class are taxed alike. *McHenry v. Alford.*

In the next place, as we think, the argument is overruled by those decisions of this court which hold that a state has power to contract with respect to taxation. We doubt if there is a single state constitution which does not contain provisions for uniformity of taxation and against discrimination. It has been argued for a hundred

years, and certain justices of this court have argued from time to time that it was incompetent for a state to contract on this subject; impossible for one legislature to bargain away the right of future legislatures to tax as they please. But this court has held uniformly that it was competent for a state legislature to make such contract. These decisions we think must be adjudications to the effect, that the courts cannot say that such contracts fairly entered into are contrary to a constitutional provision requiring uniformity of taxation; for as before stated, there is probably not a state constitution in which uniformity is not required. Moreover, these decisions are also authority for our proposition, IV, that the constitutional provisions in question have no bearing upon a contract made by the state in which it receives the full consideration for future taxes.

In *State of New Jersey v. Wilson,* 7 Cranch 164, the legislature made a settlement with Indians, by which the Indians released certain lands to the state and certain lands were purchased by the Indians with a provision that they should thereafter be subject to no tax. This was held to constitute a contract which could not be rescinded by subsequent legislation.

In *Gordon v. Appeal Tax Court,* 3 How. 133, the legislature of a state accepted from a banking corporation a payment as a consideration for the franchise granted, with a provision that the state was not to "impose any further tax or burden upon

them during the continuance of their charter under this act." Held: to be a contract which the legislature had power to make and which could not be subsequently repealed.

In *State Bank of Ohio v. Knoop,* 16 How. 369, a grant was made of a charter to a bank, providing that no more than a specified amount of taxes should be levied on its property during a term of years. The Ohio constitution contained substantially section 3 of Article IX of the Minnesota constitution. Minnesota adopted it from Ohio. But this court held that the state had a right to make the contract, reversing the supreme court of Ohio which had decided to the contrary. This case was followed by *Jefferson Bank v. Skelly,* 1 Black which involved the same state of facts, and in both cases this court distinctly declined to follow the decision of the supreme court of Ohio to the effect, that the legislature had no power under the constitution of Ohio then existing to make the contract in question.

In *University v. People,* 99 U. S. 309, this court construed a grant of exemption from taxation made by the legislature of Illinois to Northwestern University and held that a later statute impaired the obligation of the grant of exemption. The case was a writ of error to the supreme court of Illinois and the state court had held that the original contract made in 1855 was invalid, because in conflict with the state constitution of 1848. The state court had held that the legislature in 1845

had no right under the state constitution to exempt anything except property in immediate use for school purposes; but this court reversed that decision, holding the construction placed by the supreme court of Illinois on the state constitution was erroneous.

In *Asylum v. New Orleans,* 105 U. S. 362, an institution for the relief of destitute females had been incorporated in 1853 by act of general assembly which exempted all the property of the corporation from taxation. A decision of the supreme court of Louisiana held, construing this exemption, that it did not include certain kinds of property, but this decision was reversed in this court.

Various decisions in the state courts bear on the question.

The constitution of Wisconsin provides: "The rule of taxation shall be uniform and taxes shall be levied upon such property as the legislature shall prescribe." Under the constitution of Wisconsin the question had been very much mooted and had been passed on or touched upon by different decisions of the supreme court from an early day, which decisions were not altogether consistent with each other. The question finally came before the supreme court of that state in *Wisconsin Central Railroad Company v. Taylor County,* 52 Wis. 37. It was elaborately considered by the court in its opinion, page 57, and subsequent pages, and the gross earnings tax upon railroad lands was held valid.

The constitution of Iowa (adopted 1846, sec. 30,

Art. 3) declares "the general assembly shall not pass local or special laws * * * for the assessment and collection of taxes for state, county or road purposes * * * and in all * * * cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Under this provision it was decided that an act of the legislature was valid, exempting all property, including the residences of professors, upon the grounds of literary institutions, and the dwellings of clergymen owned by religious societies, and used exclusively for such dwellings, without income to the owners. *Trustees of Griswold College v. Iowa,* 46 Iowa 275.

Section 1, Article 11, of the constitution of Kansas, adopted in 1859, provides "the legislature shall provide for a uniform and equal rate of assessment and taxation." This is a very strong section, not only requiring uniformity of rate but equality of rate; but an act providing a different method of assessing and collecting taxes on railroad property than other property was held not to be unconstitutional. *Railroad Company v. Morris,* 7 Kan. 210. And in *Francis v. Railroad Company,* 19 Kan. 303, it was held, Brewer, J., giving the opinion of the court, that an act of the legislature providing for the collection of state taxes directly through the machinery of the state government, on railroad property in unorganized counties of the state, *where no other property was taxed,* was not in violation of this constitution.

The constitution of Louisiana provided "taxation

shall be equal and uniform throughout the state. After 1848 all property on which taxes may be levied in this state shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied." In *Louisiana State Lottery Co. v. New Orleans,* 24 La. An. 86, it was held that the lottery company might be exempted from ordinary taxation in consideration of its annual payment into the state treasury of a certain amount for the benefit of the school fund. And in *New Orleans v. Kaufman,* 29 La. An., 283, it was held that the constitution did not prohibit the legislature from dividing the objects of taxation into different classes and imposing different taxes on each class. It merely required that the tax on each member of the same class should be the same. See also *New Orleans v. Davidson,* 30 La. An. 554, and *New Orleans v. Fourchy,* 30 id., 910.

The constitution of Michigan adopted in 1850, provided "the legislature shall provide a uniform rate of taxation except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law." And section 12 said "all assessments hereafter authorized shall be on property at its cash value." In *People v. The Auditor,* 7 Mich. 84, an act of the legislature of 1853, remitting certain taxes for the term of five years to the contractors of a ship canal under a land grant to aid the canal, was held valid, Martin, C. J., saying:

> "This provision of the constitution has no reference to the power to exempt or to remit taxes, which is, and necessarily must be, to a great extent, left to the discretion of the legislature. * * * The legislature has the power of prescribing the subjects of taxation and of exemption, but it cannot arbitrarily tax property according to locality, kind or quality without regard to value, but in this respect it must act by uniform rule. But to exempt property as is done in the case of church, school, or library property, or to remit taxes for any cause, has nothing to do with the uniformity of the rule of taxation. Pages 90, 91."

Manning, J., said also:

> "There is nothing in the constitution in express terms inhibiting the enactment of the law by the legislature * * * The two sections taken together mean that all descriptions of property *subject to taxation* shall pay such proportion of a tax as their cash value bears to the aggregate cash value of the whole property subject to the tax."

And the judges agree that it was competent for the legislature to exempt the lands from taxation for five years. See, also, the opinion of the court by Judge Cooley in *Youngblood v. Sexton,* 32 Mich. 406.

The constitution of New Jersey, adopted in 1875, provided "property shall be assessed for taxes under general laws and by unifrom rules, according to its true value." Under this provision it was held that an act exempting mortgages from taxation, except under certain conditions, was constitutional. *State, Vail's Exrs. v. Runyon,* 41 N. J. Law. 98.

Section 1 of Article 9 of the new constitution of Pennsylvania, adopted in 1873, provides, "all taxes

shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may, by general laws, exempt" certain property named. In *Kittanning Coal Co. v. Commonwealth,* 79 Pa. St. 100, it was held that an act taxing coal companies on their franchises according to the amount of coal mined is constitutional. Agnew, C. J., said, in the opinion of the court:

> "Clearly there is nothing in this (constitutional provision) prohibiting the power to classify. Will it be argued that persons or the owners of property cannot be classified? For example: can it be said that all single freemen cannot be required to pay a uniform tax? Or that the owners of horses or mules or of cattle cannot be taxed upon their horses, mules and cattle at a certain rate? Or that the owner of unseated lands, or farms or mills, or houses and lots cannot be taxed at a uniform rate? What difference is there between saying that all horses and mules shall be taxed at a certain rate and saying that the owners of these horses and mules shall be taxed at the same rate upon them? The distinction is evidently unmeaning. Persons pay taxes, not property. This is so even when the remedy for the recovery of the tax is *in rem.* The law only takes hold of the property as a means of enforcing the duty of the person. When the constitution enjoins uniformity of taxation, it is because of the right of the citizen, not of a right possessed by his property. * * * Hence, when the constitution said that all taxes shall be uniform upon the same class of subjects within a given territory, it did not mean to separate the property from its owners, or that property and not persons should pay taxes. This would be simply absurd, for inanimate things cannot

> perform duties. Taxes shall be uniform, because of the right of the citizen to bear no more than equal burdens. * * * But without the power to classify men, as well as things, this undesirable inequality cannot be avoided; for if visible or tangible things only can be classified for taxation, then those whose wealth consists in that which is not visible or tangible, though it be far beyond the few visible effects of the poorer citizen, will not bear their proper share of the public burden. And among corporations or artificial persons the same result will take place. * * * But by classification this inequality between persons, natural or artificial, can be avoided. It is clear, therefore, that the moment we concede the power to classify, we have disposed of the question of uniformity, for then all that is required by the constitution is uniformity of taxes among the members of the class. * * * We must conclude therefore that a classification of coal mining and purchasing and selling companies is not beyond the legislative power, and the tax being clearly uniform upon their business measured by the extent of it, is not only within the meaning of the constitution, but is equal and just."

The constitution of Mississippi provided, "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." In *Mississippi Mills v. Cook*, 56 Miss. 40, a statute was sustained providing for the exemption of all factories "for the manufacture of cotton and woolen goods, or yarns, or fabrics composed of those or any other materials."

The constitution of Illinois provided "the general assembly shall provide for levying a tax by valua-

tion, so that every person and corporation shall pay a tax in proportion to the value of his or her property." But the exemption of the Illinois Central Railroad Company from ordinary taxation in consideration of paying into the state treasury a percentage of its gross earnings was held valid in *Illinois Central Railroad Co. v. McLean,* 17 Ill. 291. In the case of *Hunsacker v. Wright,* 30 Ill. 146, it appeared that the charter of a city provided that its inhabitants should be exempt from performing labor on the roads beyond the city limits, or taxes to procure labor for such purpose, and the property within the city should be exempt from taxes levied for county purposes; provided the city should support the resident paupers thereof, and pay the expenses of the circuit court in all criminal cases for offenses committed by citizens, and all jail fees accruing therefrom. The court held that while under the Illinois constitution the legislature could not exempt a person or community of persons from their share of the public burdens, still the legislature might commute a tax for an equivalent burden, and that in commuting the general assembly was the sole judge of the sufficiency of the equivalent to be received in lieu of the tax.

In Arkansas the constitution provided "all property subject to taxation shall be taxed according to its value---that value to be ascertained in such manner as the general assembly shall direct; making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another

species of property of equal value." The decisions under this provision are quite numerous and for lack of space we merely refer to them. They will be found to sustain our contention. *State v .Crittenden County,* 19 Ark. 360; *St. Louis R. R. Co. v. Berry,* 41 Ark. 509; *Arkansas Midland Ry. Co., v. Berry,* 44 Ark. 17; *Cairo Railroad Co. v. Parks,* 32 Ark. 131; *Memphis Railroad Co. v. Berry,* 41 Ark. 436.

VII.

We have presented the case thus far without any reference to the constitutional amendment of 1871, Art. IV, sec. 32a, which reads as follows:

> "Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state, or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of such railroad companies now existing, or hereafter organized, shall, before the same shall take effect and be in force, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."

Even assuming, for the purposes of the argument, that the laws providing for the payment of a percentage of gross earnings in lieu of all other

taxes were void when enacted, yet they were rendered valid and binding contracts by the above amendment.

When the provision of the federal constitution prohibiting a state from passing any law violating the obligation of a contract is invoked, one of the points which the federal court must determine is whether there was any such contract as is claimed to have been violated, and in determining this question the federal court is not controlled by the decision of the state court, even if it involves the construction of a statute or the constitution of such state. So here, assuming that the laws passed by the state of Minnesota were void when enacted because in conflict with the state constitution and therefore not binding contracts, it is still a federal question whether the state did not thereafter by amending its constitution ratify those laws and make them valid contracts binding upon the state.

In order to fully appreciate the force and effect of this constitutional amendment, it is necessary to take into consideration the history and condition of legislation on this subject at the time it was made.

When this constitutional amendment was adopted all the railroads in Minnesota were paying a percentage of their gross earnings in lieu of all other taxation. There was no general law providing for this method of taxation, but each railroad was paying its taxes in this way by virtue of some special law in the form of a contract with the state. This method of taxing railroads had

been inaugurated by the territory of Minnesota before the organization of the state. (Chap. 1, Laws of Minnesota, Extra Session of 1857.) The territory, when granting charters to various railroads, had provided that the payment of three per cent of their gross earnings should be in lieu of all other taxation and most of the railroad companies operating in the state in 1871 were organized under such territorial charters and paying their taxes under contracts made with the territory. A few railroads were paying similar taxes under similar contracts made with the state after its organization, one of which was the Lake Superior and Mississippi Railroad Company, the predecessor of the St. Paul and Duluth Railroad Co., and another the Northern Pacific Railroad Co. Prior to 1871, the state legislature had, at various times, at the request of the various railroads, reduced the percentage of gross earnings which the railroad companies had theretofore agreed to pay. This reduction, however, was only to continue for a limited period. (See chapter 2, Special Laws, 1861, chapter 17, Special Laws 1862, and chapter 2, Special Laws 1863, as to Minneapolis & Cedar Valley Railway Co.; chapter 18, Special Laws 1862, chapter 1, Special Laws 1864, as to Root Rover Valley and Southern Minnesota Railroad Company and its successors; chapter 4, Special Laws 1864, chapter 6, Special Laws 1865, chapter 52, Special Laws 1870, as to the Minnesota & Pacific Railroad Company and its successors; and chapter 10, Special Laws 1865, as to the Winona

& St. Peter Railroad Company, successor of the Transit Railroad Company.)

This action of the legislature reducing the percentage of gross earnings to be paid by railroads had caused dissatisfaction and the amendment to the constitution was adopted to prevent the legislature from making any further changes favorable to the railroad companies at the request of those companies unless such changes were expressly ratified and adopted by the popular vote.

It must also be taken into consideration that two years before the adoption of this amendment, the supreme court of the state had held in the case of *First Division v. Parcher, supra,* that the laws passed by the territory and accepted by the railroad companies, providing for the payment of gross earnings taxes in lieu of all other taxation were valid contracts binding upon the state and irrepealable. It must, therefore, have been well understood that the legislature could not amend or modify those territorial laws without the consent of the railroad companies interested.

This was the situation when the amendment was adopted and the amendment must be construed with reference to those conditions.

An examination of the language of the amendment shows that its purpose was not to modify or change any of the laws providing for the commuted system of taxation in any respect, but it impliedly recognizes the existing laws as valid and puts a check upon the legislature to prevent its consenting to any change being made in them at the

request of the railroad companies, unless the people assented to such change by popular vote.

This amendment recognized the validity of the gross earning laws and therefore, even if prior to that time those laws which had been enacted since the adoption of the state constitution were invalid because in conflict with its provisions, yet by this amendment they were ratified and made as valid and effectual as if they had been expressly authorized when enacted. The supreme court of the state has held that this was the effect of the amendment in *State v. Luther, supra,* with reference to the Act of 1865, now under consideration. This doctrine was reaffirmed by the same court in the decision which is now here for review, but it held further that the ratification of those laws by the adoption of the amendment was only a qualified ratification and that there was an implied reservation of the right to repeal or amend such laws without the consent of the railroad companies affected.

The question then is this, was the effect of the amendment to ratify and validate those laws as they stood or was the effect of it to ratify them in part and modify them in other respects. We assert that there is nothing in the amendment that indicates any intention to take any thing away from the laws as they stood on the statute books, but that the whole purpose was to preserve them as they were and to place an additional check upon their amendment or repeal. These laws, as they were enacted, were in the form of contracts and

they are the laws that were recognized as valid and ratified and not some other laws less burdensome upon the state. There is nothing to indicate that the people intended to assert the right to change them without the consent of the railroad companies interested, but it is apparent that they did intend to provide that the railroad companies and the legislature of the state could not thereafter agree upon a modification of the laws and make them more favorable to the railroads without the express consent of the people by popular vote. That such was the intention of the people and that this is the construction that should be placed upon the amendment appears more clearly when we take into consideration that the amendment applies chiefly to laws passed by the territory which were binding, irrepealable contracts. The people of the state had no power to reserve any right to repeal or modify those contracts without the consent of the railroad companies interested; so, as to the territorial laws, it is clear that the amendment only referred to such a repeal or amendment made *with the consent of the companies interested* and it is apparent that no distinction is made in the amendment between territorial laws and state laws; it was intended to affect both in the same manner. The effect of this amendment to the constitution was to ratify Chap. 8, Laws 1865, and Chap. 65, Laws of 1870, as they stood, and being contracts they are ratified as contracts without any qualification or reservation.

C. W. BUNN,

Of Counsel for Plaintiff in Error.

Brf. of Hornblower, Davies & Hadley for P. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Dec. 7, 1899.

No. 101.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,
Plaintiff in Error,

against

STATE OF MINNESOTA, on the relation of JAMES N. MARR,
Defendant in Error.

Brief for Plaintiff in Error on Behalf of St. Paul and Duluth Railroad Company.

WILLIAM B. HORNBLOWER,
JULIEN T. DAVIES,
EMERSON HADLEY,
Of Counsel for St. Paul and Duluth Railroad Company, on behalf of Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,
Plaintiff in Error,

AGAINST

STATE OF MINNESOTA, on the relation of JAMES N. MARR,
Defendant in Error.

October Term, 1899.
No. 102.

Brief for Plaintiff in Error on Behalf of St. Paul and Duluth Railroad Company.

STATEMENT.

This cause comes before this Court on a writ of error to review the decision of the Supreme Court of the State of Minnesota. The assignment of errors will be found at pages 2 and 3 of the printed record.

The controversy herein arises under a statute passed by the Legislature of Minnesota in the year 1895, being Chapter 168 of the General Laws of that year. This statute is claimed by the plaintiff in error to be in violation of the Constitution of the United States as impairing the obligation of the contracts contained in various prior statutes of the State granting lands to the St. Paul and Duluth Railroad Company and other railroads upon certain conditions therein set forth.

The Supreme Court of Minnesota held that the Act of 1895 did not violate the provisions of the United States Constitution, and was a valid act of the Legislature.

This cause came before the Supreme Court of Minnesota on an appeal from the decision of the District Court of the Fifteenth Judicial District, granting a writ of mandamus on the relation of James N. Marr, a taxpayer of the County of Aitkin, which writ of mandamus directed Fred Stearns, as County Auditor of Aitkin County, to place upon the tax list of the County of Aitkin for the year 1897 certain lands in said county.

The findings made in the District Court, based on admissions made upon the trial of allegations of the answer (Record, pp. 28–38), show that a portion of these lands, to wit, the first parcel described in the alternative writ of mandamus "is now, and for several "years last past has been, the property of the St. Paul "and Duluth Railroad Company" (on behalf of whom this brief is filed). The findings further show that the St. Paul and Duluth Railroad Company was originally incorporated by the Legislature of the Territory of Minnesota under the title of "Nebraska and Lake "Superior Railroad Company," by an act approved May 23, 1857. This act was amended by the Legislature of the State of Minnesota by an act approved March 8th, 1861, which granted to the company certain swamp lands which had previously been granted to the State of Minnesota by the United States pursuant to Acts of Congress. By an act approved March 6, 1863, and various other acts subsequently passed, the name of the company was changed to the Lake Superior and Mississippi Railroad Company, and the Act of 1857 further amended. On or before January 1st, 1874, the Lake Superior and Mississippi Railroad Company defaulted in payment of interest on its first mortgage bonds, and a foreclosure suit was brought, and on or about March 8, 1877, a decree was made foreclosing the mortgage

and directing a sale. Thereafter all the franchises, rights, immunities and properties of the Lake Superior and Mississippi Railroad Company were sold and thereafter were duly transferred to a new corporation organized pursuant to an act of the legislature of Minnesota approved March 6, 1876, which corporation was known and has ever since been known as the St. Paul and Duluth Railroad Company, and the St. Paul and Duluth Railroad Company became thereby entitled to all the corporate and other franchises and all the rights, privileges, immunities and property of the Lake Superior and Mississippi Railroad Company. All of the foregoing facts were admitted by relator on the trial, as set forth in the answer (pp. 54, 55).

By an act of Congress approved May 5, 1864, entitled:

"AN ACT making a grant of lands to the State of
"Minnesota to aid in the construction of a
"Railroad from St. Paul to Lake Superior"

the United States granted to the State of Minnesota for the purpose of aiding in the building of a line of railroad from the City of St. Paul to the head of Lake Superior, being the road authorized to be constructed by, and referred to in the said several Acts of the State of Minnesota hereinbefore referred to, every alternate section of public land of the United States designated by odd numbers to the amount of five alternate sections per mile on each side of the said railroad on the line thereof, within the State of Minnesota; with the right, in case any lands were lost from the grant before the definite location of the line of road, to select indemnity lands therefor from the lands of the United States nearest to the line of sections granted as aforesaid in certain sections or parts thereof within twenty (20) miles of said line of road.

Thereafter by an Act of Congress, approved July 13, 1866, entitled, "An Act to amend an Act making a

" grant to the State of Minnesota to aid in the con-
" struction of a Railroad from St. Paul to Lake Su-
" perior; approved May 5, 1864," it was provided that in case it should appear, when the line of the Lake Superior and Mississippi Railroad had been definitely located that the quantity of land intended to be granted by the Act of May 5, 1864, in aid of the construction of said road should be deficient, by reason of the line thereof running near the boundary line of the State of Minnesota, the said company should be entitled to take from any public lands of the United States, within thirty (30) miles of the west line of said road, such an amount of lands as should make up such deficiency, provided only that such lands so taken should be in alternate odd numbered sections.

By an act of the Legislature of the State of Minnesota, approved February 23, 1865 (Sp. Laws of Minnesota for 1865, Chap. 2), the State of Minnesota accepted the said Act of Congress of 1864, and the grants of land thereby made, and further in execution of the trust imposed upon the State of Minnesota by Congress, by said act of the Legislature of the State of Minnesota, the lands granted by Congress were by said State of Minnesota granted and transferred to and vested in the Lake Superior and Mississippi Railroad Company, its successors and assigns, to aid in the construction of its line of road, and said lands are now owned by the St. Paul and Duluth Railroad Company as the successor in interest of said Lake Superior and Mississippi Railroad Company.

Section 1 of that act provided that the lands granted to the State of Minnesota "to aid in the " construction of the Railroad from St. Paul " to Lake Superior " were accepted, " and the same " are hereby granted, vested in, and transferred to " the Lake Superior and Mississippi Railroad Com-
" pany, its successors and assigns, to be held, used or " sold and disposed of by said railroad company, to " aid in the construction of a railroad, as contemplated

" and provided by said act of Congress, and for the " equipment and operation of the same, and for no " other purpose whatever; the same to be held, used, " and disposed of upon and subject to the conditions in " said Act of Congres provided, and upon the conditions " in this act contained. That in consideration of the " lands granted by this act, and of the lands, rights, " privileges and franchises which have heretofore been " granted to said railroad company, the said company " shall, on or before the first day of March of each and " every year *after said railroad is completed and in " operation*, pay into the treasury of the State three " per cent. on the gross earnings of said railroad, which " sum shall be in lieu and in full of all taxation and " assessment upon the said railroad, its appurtenances " and appendages, and all other property of said " company, real, personal and mixed, including the " lands hereby and heretofore granted to said com- " pany, or so intended to be granted. Provided, how- " ever, that the lands hereby and heretofore granted " to said company shall be subject like lands of indi- " viduals, to be taxed as fast as the same are sold or " conveyed, or contracted to be sold, or are leased by " said company, or the stumpage upon any lands is " sold or contracted to be sold by said company; but " no mortgage or trust deed executed by said com- " pany upon said lands, shall, for the purpose of taxa- " tion, be construed as such sale, conveyance, lease or " contract of sale."

The statute then provided that an accurate account of the earnings should be kept by the company, a verified abstract of which should be furnished to the Treasury of the State, in each year, with full power in the Governor of the State or any other person appointed by law to examine the books and the officers and employees of the company.

" And for securing to the State the payment of the " aforesaid per centum, it is hereby declared that the " State shall have a lien upon the railroad of said

" Company and upon all other property of said " Company, real, personal and mixed, and the lien " hereby secured to the State shall take and have " precedence of all demands, decrees and judgments " against said company. Provided, further, that said " Railroad lands shall be taxed as other lands in the " State in five years after the said Company shall be- " come entitled to said lands."

Section 2 of the act provided for patents to the road of the swamp land granted by the Act of 1861 and of the Congressional lands as earned by the construction of sections of the road.

Section 3 provided the periods of time for construction.

Section 4 provided for the deposit by the railroad company of twenty thousand dollars, to be withdrawn when the road was completed.

Section 5 provided for the execution of bonds and mortgages by the company.

Section 6 permitted the company to patent its swamp lands as soon as earned, to be held under Section 2 of the act.

Section 7 provided for the exchange of cars with connecting roads, and repealed Section 12 of the Act of March 8th, 1861.

Section 8 permitted the construction of telegraph lines and charges for the messages sent thereon.

Section 9 related to directors of the company, their number and qualifications and place of meeting

This statute, materially affecting and amending the charter of the company contained in the Act of March 8th, 1861, and subsequent acts was, itself, amended and modified by Chapter 8, Special Laws of 1865, approved March 3d, 1865, in particulars affecting the taxation of the property of the company. The first section contained a careful provision for the taxation of the lands after contract for sale or lease, so as to reach for assessment and taxation the interest of the vendee and lessee, and for sale of such

interest, in the event of nonpayment of the tax without affecting the title of the company. It further increased the burdens of the company as to taxation, by providing that in place of the gross earning tax commencing only upon the completion of the road, according to the terms of the act of February 23, 1865, there should be paid during the first three years after thirty miles of railroad had been completed and were in operation, one per cent. upon the gross earnings, and two per cent. thereafter for the next seven years, and thereafter the tax thereon of three per cent. should be paid to the State of Minnesota.

Section 1 of the Act of March 3d, 1865, being Chapter 8 of the Special Laws for 1865, provided as follows:

"I. That whenever any lands heretofore or hereafter "granted to the Lake Superior & Mississippi Railroad "Company to aid in the construction or completion of "its road or branches, shall be contracted to be sold, "conveyed or leased by said Company, the same shall "be placed upon the tax list by the proper officer for "taxation as other real estate, for the year succeeding "that in which such contract for a sale, conveyance or "lease thereof shall have been made, but in enforcing "a collection of the taxes thereon, the title or interest "of the said Company or of any trustee or mortgagee "thereof shall be in nowise impaired or affected "thereby, but the improvements thereon and all the "interest of the purchaser or lessee therein, may and "shall, in case of default in the payment of taxes upon "such land, be sold to satisfy the same, and it shall be "the duty of the proper officers to assess and collect "such taxes in accordance with the general laws relating to the assessment and collection of taxes, and "that the provisions of the several Acts in relation to the taxation of the lands of said Company, so far as the mode of taxing such lands conflict with the provisions of this act, shall "be and they are repealed. Provided, that "said company shall, during the first three years

" after thirty miles of said railroad shall be " completed and in operation, on or before the first " day of March in each and every year, *pay into the* " *Treasury of the State one per cent. on the gross* " *earnings of said railroad*, the first payment to be " made on the first day of March next after thirty " miles of the said railroad shall be completed and in " operation, and shall, during the seven years next en- " suing, after the expiration of the three years afore- " said, pay into the Treasury of this State, on or be- " fore the first day of March of each and every year, " *two per cent. of the gross earnings of said railroad*, " and shall, from and after the expiration of said seven " years, on or before the first day of March of each " and every year, *pay into the Treasury of this State* " *three per cent. of the gross earnings* of said railroad, " *and the payment of such per centum annually, as* " *aforesaid, shall be and is in full of all taxation and as-* " *sessment whatever.*"

Then follow provisions for the account of earnings to be kept by the company, the abstract to be furnished to the Treasurer of the State annually and power of examination by the officers of the State, and for the lien upon the railroad of the company in favor of the State.

" SECTION 2. That upon the filing by said company " in the office of the Secretary of State of a notifica- " tion of its acceptance of this act the same shall " become *obligatory upon the State* and upon said " company, provided that said notification shall be " given within sixty days."

Acceptance was duly made by the Lake Superior and Mississippi Railroad Company of both Acts, chapters 2 and 8, of 1865, and thereafter the railroad was built on the faith of the contract thus made with the State, and the provisions of the Acts have been continuously and fully complied with by the railroad company and its successor company (fols. 15, 29, 58 and 60 of Record, and admissions of defendant in error at the trial, fol. 949, Record).

Chapter 168 of the Laws of 1895 undertakes to repeal the provisions of this act, as well as other similar acts, for commuted taxation of the land grant lands, thus leaving the railroad company under the burden of the gross earnings tax, and imposing upon it the additional burden of having its land grant lands taxed "as other lands are taxed in this State."

The defendant in error contended in the Court below, and the Court allowed the contentions that Chapter 168, General Laws of Minnesota, 1895, was legally passed by the Legislature; that Chapters 2 and 8 of the Special Laws of 1865 of Minnesota, under which the St. Paul and Duluth Railroad Company paid a tax of three per cent. of its gross earnings in lieu of all other taxes, were invalid, because in violation of Sections 1 and 3, Article IX. of the Constitution of Minnesota, and consequently that Chapter 168 General Laws of Minnesota 1895, directing that all lands owned by railroads should be taxed as other lands were taxed in that State was valid and operative and not in violation of any contract which otherwise would have been created by the said Chapters 2 and 8 of the General Laws of 1865.

The plaintiff in error claims that Chapters 2 and 8 of the General Laws of 1865 clearly created a contract which the acceptance, filed by the predecessor of the plaintiff in error and the construction of the road in reliance thereon (R., p. 6), made mutually binding upon the State and the plaintiff in error, that said statutory contract was not in violation of Sections 1 and 3 of Article IX. of the State Constitution, and that consequently Chapter 168 of General Laws of 1895 constituted a breach of the said statutory contract and was a direct of violation of Article I., Section 10 of the Constitution of the United States, and further, that Chapters 2 and 8 of Laws of 1865 were ratified and confirmed by an amendment to the Constitution of Minnesota, in the year 1871.

No question was argued or even raised in the Court

below with respect to the right of the St. Paul and Duluth Railroad Company as the successor of the Lake Superior and Mississippi Railroad Company to enjoy the benefits of Chapters 2 and 8 of the Laws of 1865, or with respect to its obligations to perform all the requirements thereof.

Assignments of Error.

The following assignments of error are made relative to the St. Paul and Duluth Railroad Company:

1.

The Supreme Court of the State of Minnesota erred in holding that a certain law of the State of Minnesota, being Chapter 168 of the General Laws of Minnesota of the year 1895, was constitutional and valid.

2.

The Supreme Court of the State of Minnesota erred in deciding that the said Chapter 168 of the General Laws of the State of Minnesota for the year 1895, repealed and amended Chapter 8 of the Special Laws of the State of Minnesota for the year 1865, and did not violate the obligation of a contract contrary to the Constitution of the United States.

3.

* * * * * *

4.

The Supreme Court of Minnesota erred in deciding that Chapter 8 of the Special Laws of the State of Minnesota of the year 1865 is not a valid contract binding upon the said State.

5.

* * * * * *

6.

The Supreme Court of the State of Minnesota erred in deciding that Chapter 8 of the Special Laws of Minnesota of the year 1865, ratified and validated by the amendment to the Constitution of the State of Minnesota of the year 1871, is not a contract binding upon the State, and can be amended or repealed without violating the obligation of a contract.

7.

* * * * * *

The case involves the construction of the following statutes and constitutional provisions of the State of Minnesota:

1. Chapters 2 and 8 of the Laws of 1865, with respect to the claim of plaintiff in error, that their terms create a contranct between the State and the railroad company.

2. Sections 1 and 3 of Article IX. of the State Constitution with respect:

(a) To the claim of plaintiff in error that the land-grant lands of the railroad company are not subject to the operation of their provisions, and

(b) To the claim of plaintiff in error that a system of commutation of taxation of a railroad company by substituting a gross-earnings tax for an *ad-valorem* tax is not a violation of their provisions.

3. The amendments of November 8th, 1871, Section 32 of Article IV. of the Constitution of Minnesota, with respect:

(a) To the claim of plaintiff in error that it ratified the contract contained in Chapters 2 and 8 of the Laws of 1865, and

(b) To the claim of defendant in error that such ratification was conditioned upon the right of the Legislature without the consent of the railroad company to amend or repeal Chapters 2 and 8.

POINTS.

I.

This Court is not bound by the construction placed by the Supreme Court of Minnesota upon the Constitution and statutes of that State.

II.

The construction placed by the Supreme Court of Minnesota upon the Constitution of that State is incorrect. There is nothing in the Constitution of Minnesota, properly construed, which makes invalid the legislation providing for a tax upon the gross earnings of the St. Paul and Duluth Railroad or its predecessor in lieu of direct taxation of its lands.

III.

The grants made by the State to the predecessors of the St. Paul and Duluth Railroad Company, and the provisions of the statutes with regard to the commuted taxation of the lands so granted, by means of the gross earnings tax, constitute a contract between the State and the railroad company within the provision of the Federal Constitution.

IV.

The land grant lands of the St. Paul and Duluth Railroad Company are not subject to the operation of Sections 1 and 3 of Article IX., of the Constitution of the State of Minnesota.

V.

The provisions of chapters 2 and 8 of Laws of 1865, relative to the gross earnings tax in lieu of all other taxation of the property of the railroad company were ratified and confirmed by the amendment to the Constitution of 1871, and said amendment did not confer upon the Legislature the right to amend or repeal those statutes without the consent of the railroad company.

VI.

Chapter 168 of the Laws of the State of Minnesota, of 1895, impairs the obligation of the contract and is void under the provision of the Federal Constitution.

FIRST POINT.

This Court is not bound by the construction placed by the Supreme Court of Minnesota upon the Constitution and Statutes of that State.

This cause comes before this Court upon a writ of error brought to review the decision of the highest Court of the State of Minnesota, on the ground that that Court has upheld a statute of that

State which plaintiff in error claimed to be a statute impairing the obligation of a contract of the State of Minnesota, and, therefore, to be void within the provision of the Federal Constitution prohibiting any State from impairing the obligation of a contract. The contract which plaintiff in error relies on is contained in certain statutes of the State of Minnesota. The Supreme Court of Minnesota has held by its decision in this suit that those statutes were void under certain provisions of the Minnesota constitution, and that there was consequently no contract in existence. That Court also intimates, but does not decide, that these statutes by their terms, properly construed, do not create a contract (fol. 69 of Record). Of course, if this Court is bound by the construction placed by the Supreme Court of Minnesota in this suit upon the Constitution of the State, there is an end of all discussion here. Such, however, is not the rule in this class of cases. If it were the rule, the power of this Court to enforce the provision of the United States Constitution in question would be practically nullified. The rule adopted in this Court is well settled. This Court will inquire, first, whether there was a contract, and, secondly, whether it has been impaired by the legislation of the State. If the contract is claimed to have been a contract contained in legislation, this Court will inquire for itself whether such legislation did create a contract and whether such legislation is valid, and the decision of the State Court on either of these questions will be reviewed on its merits.

On a writ of error to review a judgment of the highest Court of a State, giving effect to a statute of the State, drawn in question as affecting the obligation of a previous contract, the United States Supreme Court,

" exercising its paramount authority of determining
" whether the statute upheld by the State Court did
" impair the obligation of the previous contract, *is not*

" *concluded by the opinion of the State Court as to the* " *validity* or the construction *of the contract, even if* " *contained in a statute of the State,* but determines for " itself what that contract was."

N. O. Waterworks vs. La. Sugar Co., 125 U. S., 36, and cases cited.

" When the State Court upholds the subsequent " law, on the ground that the contract did not confer " the right claimed, this Court may inquire whether " the supposed contract did give the right, because, if " it did, the subsequent law cannot be upheld."

125 U. S., 38.

" A statute of Illinois, passed in 1855, declares that " all the property of the Northwestern University " shall be forever free from taxation. As construed " by the assessors and by the Supreme Court of the " State, a statute of 1872, conforming taxation to the " new constitution of 1870, limited this exemption to " land and other property in immediate use by the in- " stitution. *Held,* 1. That the latter statute impaired " the obligation of the contract of exemption found in " the statute of 1855. 2. *That whether the statute of* " *1855* is a valid contract, or *is void by reason of its* " *conflicting with the State constitution of 1848, under* " *which it was made, is a question on which the judg-* " *ment of that Court can be reviewed here.*"

University vs. People, 99 U. S., 309.

See opinion of Mr. Justice MILLER at pp. 319, 321, 323.

The case of *Mobile & Ohio Railroad Company vs. Tennessee,* 153 U. S., 486, is almost identical with the case at bar. In that case the Supreme Court of Tennessee had decided that the provision in the 11th section of the Tennessee charter of the Mobile and Ohio Railroad Company, that no tax shall ever be laid on said road or its fixtures which shall reduce the dividends below

eight per cent., was null and void under the Constitution of the State of 1834, which was in force at the time of the granting of the charter, and that subsequent legislation imposing taxes upon the company did not violate or impair the obligation of any contract with the railroad company. This Court held that it had jurisdiction to revise the judgment of the Supreme Court of Tennessee, and to consider the question of the construction of the Constitution of Tennessee of 1834, and this Court overruled the decision of the Supreme Court of Tennessee in this particular, and held that under the Constitution of 1834 the Legislature of Tennessee had power to grant to the railroad company the exemption from taxation contained in the 11th section of the act of incorporation. The decision of the Court is thus summed up:

"It is well settled that the decision of a State "Court holding that as a matter of construction a "particular charter or a charter provision does not "constitute a contract is not binding on this Court. "The question of the existence or non-existence of a "contract in cases like the present is one which this "Court will determine for itself, the established rule "being that, where the judgment of the highest Court of "a State by its terms or necessary operation gives "effect to some provision of the State law which is "claimed by the unsuccessful party to impair the con- "tract set out and relied on, this Court has jurisdiction "to determine the question whether such a contract "exists as claimed, and whether the State law com- "plained of impairs its obligation."

See, also, to the same effect:

Jefferson Branch Bank vs. Skelly, 1 Black, 436.

See language of Mr. Justice WAYNE at p. 443.

Douglass vs. Kentucky, 168 U. S., 488, 503.

Chicago, etc., Railroad vs. Nebraska, 170 U. S., 57, 68.

SECOND POINT.

The construction placed by the Supreme Court of Minnesota upon the Constitution of that State is incorrect.

The Supreme Court of the State held that the statutes on which we rely were in violation of Article IX., Sections 1 and 3 of the State Constitution, reading as follows:

"SECTION 1. All taxes to be raised in this State shall "be as nearly equal as may be, and all property on "which taxes are to be levied shall have a cash valua- "tion, and be equalized and uniform throughout the "State: * * *

"SECTION 3. Laws shall be passed taxing all moneys, "credits, investments in bonds, stocks, joint stock "companies or otherwise, and also all real and per- "sonal property according to its true value in "money;" * * *

The Court held that an irrevocable contract, providing for a fixed rate of taxation on the gross earnings of the railroad in lieu of a tax upon its lands, was in violation of these provisions of the Constitution and void. This we claim to be error. No previous decision to this effect had ever been made by the Supreme Court of Minnesota. The decisions and the *dicta* of the Supreme Court cases had all been the other way. Long continued practice and settled usage had sanctioned commuted taxation such as that involved in this suit. The People of the State had acquiesced in and the Courts of the State had expressly or impliedly approved such legislation. The current of authority in other States in construing similar provisions of other State Constitutions is adverse to the opinion expressed in this suit by the Supreme Court of Minnesota. The decisions of this Court are adverse to the conclusion arrived at in this suit by the Supreme Court of Minnesota.

It is to be borne in mind that we are not dealing with a Constitution of recent date, but with the Constitution of the State of Minnesota adopted at the time of the admission of that State into the Union in 1858. The long-settled practical construction placed upon that Constitution by the Legislature of the State and acquiesced in by the People and by the Courts has been for the first time overruled by the decision of the Supreme Court of the State in the case at bar in the year 1898, forty years after the adoption of the Constitution. The system of commuted taxation for railroads and for land grants connected with railroads has been enforced during that entire period. Under these circumstances every presumption is in favor of the validity and constitutionality of the legislation in question.

Constitutions will be interpreted in the light of history and of the policy of the law before and since the time of their adoption, to ascertain the meaning of the terms employed.

As will be seen hereafter, the practice of the Territory of Minnesota was universal, up to the time of the adoption of its State Constitution, to provide for the taxation of all the real and personal property of its railroad companies by a commuted system of taxation of gross earnings.

It is a fair inference that the Constitution of the State adopted in 1858 was not intended to render this method of taxation unconstitutional.

The case of Commissioners of Rice Co. vs. Citizens' National Bank, 23 Minn., 280, is a direct authority for the proposition that, under the clauses of the Constitution quoted above, real property may be taxed otherwise than *eo nomine* at its cash value.

This was a case where a bank existing under the National Banking Law was taxed under a Minnesota law upon its capital stock. It was conceded that the provisions of that statute required the assessment and taxation of all the shares comprising the entire capital

stock of the association in the name of the respective shareholders, and at their actual cash value.

It was decided by the Court that the property and interest of the bank in its real property, consisting of its bank building, was taxed under Sections 1 and 3 of Article IX. of the State Constitution, in the assessment of the shares of the capital stock of the bank under the Minnesota statute, and could not be assessed and taxed *co nomine* as real property by the county.

Our contention as to the power of the Legislature of Minnesota under the Constitution we rest upon the principles stated below :

On page 281 :

"The general policy of the law is to avoid duplicate "taxation. No one subject of taxation ought to be "required to contribute more than once to the same "public burden, while other subjects of taxation, "belonging to the same class, are required to contrib- "ute but once. In the exposition of any tax law, "therefore, a construction leading to any such result "should be avoided unless the cogency of some express "provision or unavoidable implication of the statute "compels its adoption.' Says Judge Cooley in his "valuable treatise on the law of taxation: 'It is a "'fundamental maxim in taxation that the same "'property shall not be subject to a double tax pay- "'able by the same party, either directly or indirectly ; "'and, when it is once decided that any kind or class "'of property is liable to be taxed under one provision "'of the statute, it has been held to follow as a legal "'conclusion that the legislature could not have in- "'tended the same property should be subject to "'another tax, though there may be general words in "'the law which would seem to imply that it may be "'taxed a second time.' Cooley on Taxation, 165, "and authorities cited in the notes. Especially should "this rule obtain in the courts of a state whose consti- "tution contains an express provision requiring "equality and uniformity in the imposition of taxes "upon property, according to a cash valuation."

On page 288 :

" * * * Inasmuch, however, as the agencies " created and established by the federal government, " to assist in the execution of its powers, are exempt " from state taxation save as allowed by Congress, the " state can only exercise its taxing powers over the " national banks and the capital they employ and rep- " resent in the manner and to the extent permitted " by congressional authority. Under this authority it " is permitted to the state to tax the real property of " the banks as such, and also all the shares of stock " as personal property belonging to the shareholders, " provided the rate of valuation and assessment of the " latter is no greater than is assessed upon other " moneyed capital in the hands of individuals. Within " the limits of this authority, the state may fully exer- " cise its taxing powers, in strict obedience, however, " to the requirements of its own constitution.

" As equality in taxation is the constitutional policy " of this state, no scheme of taxation can be presumed " to have been intended by the legislature which neces- " sarily involves, in its practical results, the imposition " of a greater proportionate share of its burdens upon " moneyed capital invested in the business of banking " under national laws than is imposed upon capital " similarly employed under state authority. The law " under consideration provides for the assessment of " the real property of the state banks *eo nomine*, but " does not authorize its assessment in any other form. " Capital thus invested is, therefore, subject to taxation " but once for any one object. If a like mode of assess- " ment had been intended in respect to the real prop- " erty of the national banks, it must be presumed that " some provision would have been made for deducting " the value of such property from the total value of the " shares, in order to fix upon a correct valuation of the " latter for the purpose of taxation. The omission of " any such provision was manifestly intentional, as the " shares are required to be assessed at their true and

"full value without any deduction whatever; and in "this way the real property belonging to these associa- "tions is always subjected to its proper share of "taxation."

In the territorial times when the country was new and undeveloped, an almost universal rule prevailed in the Territories that railroads paid a per centum taxation of the gross earnings in lieu of other taxation. It was the settled policy of the land. It was the policy not only in the old grants made before the State Constitutions, but in the new ones made by the States and by Congress after the adoption of the State Constitutions.

The idea that this commuted form of taxation was an exemption did not grow up in the State of Minnesota until forty years later.

Section 1 of Article IX. was enacted for the purpose of precluding that any legislative exemption or immunity should be granted to any citizen or body corporate. That all should contribute a proportionately fair share to sustain the State based upon the value of their property was understood, and that this is the true interpretation is verified by the third section of Article IX., which leaves the Legislature to formulate the manner in which these taxes shall be levied and the value of the property ascertained, and that thisis to be the guide in ascertaining what the true proportion of the tax to be borne should be. It was intended that no law should be passed giving to a corporation an immunity or exemption from taxation in proportion to the value of the property, but it was left to the Legislature to fix the manner of assessment and the method of ascertaining the value. The Legislature did this in the case of the St. Paul and Duluth Railroad Company by passing the Acts of February 23d and March 3d, 1865.

The direction contained in Section 3 of Article IX. of the Constitution that the Legislature should pass laws taxing all property did not establish a limitation

as to the means by which the Legislature might equalize any tax. The power of the Legislature is plenary.

There were many exemptions then, and it was to provide against legislative exemptions and not to prescribe the manner in which this tax was to be proportioned that this section was passed.

Curryer vs. Merril, 25 Minn., 1.

"Plenary legislative power is therefore the rule, "while the want of it is the exception; as a conse- "quence, it logically follows that every statute passed "by the state legislature is presumably valid, and the "presumption is conclusive unless it affirmatively ap- "pears to be in conflict with some provision of the "federal or state constitution; and in order to justify "the Court in pronouncing it invalid, because of its "violation of some clause of the state constitution, its "repugnancy thereto must be so clear, plain and pal- "pable as to leave no reasonable doubt or hesitation "upon the judicial minds."

Ames vs. Lake Superior & Mississippi Ry. Co., 21 Minn., 241.

It will be noticed the Supreme Court of Minnesota, as shown in the cases hereafter cited, has repeatedly declared that the commuted system when adopted was a just and reasonable commutation, and the tax paid under that system was the just proportion of tax due from the company authorized and doing business by and under the act.

It is also to be borne in mind that this is *not* a case of *exemption* of property from taxation, but of a *substituted method of taxation*. We do not, therefore, need to rely upon those cases, which are numerous, construing the constitutional provisions of other States (such, for instance, as the Constitution of Tennessee of 1834) which hold that, notwithstanding the constitutional mandate that taxes shall be equal and uniform and that property shall be taxed according to its value, the

Legislature can, nevertheless, in its discretion, entirely exempt the property of particular corporations or particular classes of corporations or particular kinds and classes of property. We shall recur to those cases later on in discussing the general subject of constitutional requirements as to taxation. We desire, however, *in limine*, to differentiate the question in the case at bar from that presented in these cases. The railroads whose property is affected by the decision in this case are not claiming an exemption from taxation. They are only claiming the benefit of the contract between them and the State guaranteeing them a commuted system of taxation based upon a percentage of the earnings of the railroad as distinguished from a direct tax upon the property itself.

This distinction has been sustained not only by the Supreme Court of Minnesota, but by this Court. It has also been held that, for the purpose of such commuted taxation, lands granted in aid of construction of a railroad are properly considered a part of the railroad system and entitled to the commuted method of taxation, although lands purchased or otherwise acquired by the company are not so entitled, unless actually used for railroad purposes.

In *McHenry vs. Alford*, 168 U. S., 651, it appeared that an act of the Territory of Dakota, passed in 1883, provided for the taxation of the lands of the Northern Pacific Railroad Company granted to it by Congress, outside of its right of way and not used by it in its business, while owned by the company and not leased, through the payment of percentages on gross earnings, as provided for therein. It was held that the plain meaning of that act was to render the railroad company and all its property—land grants as well as right of way—free from the payment of all taxes, excepting to the amount, and in the manner, described in the act.

It was further held that this Territorial act was not in conflict with the provisions of the Act of Congress of

March 2, 1861, organizing the Territory and providing that no law should be passed "impairing the rights of "private property; nor shall any discrimination be "made in taxing different kinds of property; but all "property subject to taxation shall be in proportion "to the value of the property taxed."

The Court further held that the Act of 1883 was not an act *exempting* the lands of the company from taxation, but merely substituting one method of taxation for another upon the terms and conditions specified.

Mr. Justice PECKHAM says at page 662:

"The principle that exemption from taxation must "be clearly shown and that it generally applies (if at "all) only to property used in the business of the com- "pany claiming exemption, is acknowledged and as- "sented to. The case of *Ford vs. Delta & Pine Land* "*Company*, 164 U. S., 662, is an illustration of the "principle, but it does not here apply. The language "of this act is clear and absolute. It is also not the case "of an exemption from taxation, but the substitution "of one method for another. The land here in ques- "tion is, in addition, closely connected with the busi- "ness of the company. We shall show this more at "length hereafter."

It was urged by counsel that the land included in the land grants was "simply 'property owned by a "'railroad' and not 'railroad property,'" and that it should be taxed in like manner as the land of individuals and not as part of the railroad system. The Court, however, held otherwise (see opinion of PECKHAM, J., at pp. 665 to 669).

Mr. Justice PECKHAM says at page 667:

"Unquestionably these lands have indirectly con- "tributed to the gross earnings derived from operat- "ing the road and that such earnings have arisen and "been made possible by reason of the lands. They "have not only aided in making these gross earnings "possible, but they have formed and do still form a "material factor in the combination of circumstances

" contributing to the construction of the railroad, to " its operation and to its earnings."

In *County of Ramsey vs. C., M. & St. P. Ry. Co.*, 33 Minn., 537, the Court in effect upholds the constitutionality of an act of 1873, whereby it was provided that any railroad company accepting and becoming subject to the provisions of that act should annually pay into the Treasury of the State a defined percentage of its gross earnings. By this act it is declared that, in consideration of the annual payment thereby provided for, " the railroad, its appurtenances and " appendages, and all other property, estate and effects " of said corporation, held or used for, in or about the " construction, equipment, renewal, repair, maintaining " or operating its railroad, *including* the lands granted " to said company to *aid in the construction* of said " railroad, as also the stock and capital of said com- " pany, shall be, and hereby are, forever exempt from " all taxation and from all assessments."

The Court say, at page 540:

" The corporation having accepted and become sub- " ject to the provisions of this act, its rights, as well as " those of the State, are to be determined by it."

And, again (at p. 542): " It is a general policy of " State that all property within the State, excepting " certain defined classes, of which public burying " grounds, school houses, hospitals and churches are " examples, shall bear its proper proportions of the " common burden of taxation. Many reasons doubt- " less conduced to the adoption of the provision to " which we have referred, relating to the taxation of " railroads. It is not, however, to be supposed that " this plan was adopted for the purpose of relieving " corporations or their property from their due share " of this common burden. It was not in reality a plan " for *exempting* property from taxation, but a substi- " tuted *method* of taxation. It must be supposed that " it was contemplated that this system would, upon " the whole, fairly effect the objects of taxation with

" respect to such corporations, and be equivalent in its " results to taxation of the property owned by them."

The statute in question fixed a permanent rate of three per cent. of gross earnings in lieu of all other taxation. This the Court in effect holds to be constitutional. The Court, however, holds that land not used for railroad purposes is not within the statute and is taxable.

The Court (at p. 546) distinguishes between lands purchased and acquired by the railroad company and " lands granted to railroad corporations to aid in the " construction of their lines of road," which latter are within the statutory commutation, while the former are not, unless used for railroad purposes.

Precisely similar rulings are made in

County of Stevens vs. St. P., M. & M. Ry. Co., 36 Minn., 467.
County of Todd vs. St. P., M. & M. Ry. Co., 38 Minn., 163 and
City of St. Paul vs. St. P., M. & M. Ry. Co., 39 Minn., 112,

in which cases almost the same language is used as to this "substituted method of taxation," and as to the percentage of earnings being "equivalent in its results to taxation of the property" of the company.

A fixed percentage of earnings was provided by the statute under consideration in these cases.

It is true that the charter rights of the St. P., M. & M. Ry. Co. antedated the Constitution of the State, but this is not true of the rights claimed by the C. M. & St. P. Ry. Co. under the Act of 1873 considered in the *County of Ramsey* case, 33 Minn., *supra*.

No reference is made by the Court in this case in 33 Minn. to the Constitutional Amendment of 1871, as supporting the Act of 1873.

No serious question seems to have been made by the courts of Minnesota as to the constitutionality of the various Acts of the Legislature providing for commuted taxation of railroads and other corporations until the case of the *State vs. Luther*, 56 Minn., 156, which was de-

cided in 1894. In the meantime, in the year 1871, the People had adopted a constitutional amendment, Section 32*a*, which provided as follows:

"Any law providing for the repeal or amendment of "any law or laws heretofore or hereafter enacted, "which provides that any railroad company now exist- "ing in this state or operating its road therein or which "may be hereafter organized, shall, in lieu of all other "taxes and assessments upon their real estate, roads, "rolling-stock, and other personal property at and "during the times and periods therein specified, pay "into the Treasury of this State a certain percentage "therein mentioned of the gross earnings of such Rail- "road Company now existing or hereafter organized, "shall, before the same shall take effect and be en- "forced, be submitted to a vote of the People of the "State and be adopted and ratified by a majority "of the electors of the State voting at the election at "which the same shall be submitted to them."

The question presented by the appeal was whether the "granted lands" of the St. Paul and Duluth (formerly Lake Superior and Mississippi) Railway Company are subject to be listed and taxed as other lands in the State. The Court held that under the provisions of Special Laws, 1865, Chapter 8, such lands, until sold, contracted to be sold or leased, were to be entirely exempt from taxation in the ordinary way.

The Court also held as "perfectly clear" that:

"*The Legislature intended that the granted lands* "*should remain exempt from ordinary taxation as long* "*as they continued to belong exclusively to the Company.*"

The Court further says at page 160:

"Neither is the question whether there is a grant "of immunity from taxation, but whether a commuted "system or mode of taxation has been provided. It is "a common error in construing statutes like the pres- "ent to assume that because a commuted tax is fixed "with reference to and is wholly derived from the "gross earnings of the road, therefore, the lands are

" exempt from taxation altogether. The percentage " of the gross earnings is paid as taxes on both the " railroad and the granted lands, and although derived " wholly from the former, is a commutation tax alike " on both."

It was urged that the words "shall be and is in full " of all taxation and assessment whatever" related only to "railroad property" and not to "granted lands." The Court, however, overruled this contention and held that the meaning of the act was "by necessary impli- " cation that granted lands shall not be subject to " ordinary taxation until contracted to be sold or leased " and then only to the extent of the interest of the pur- " chaser or lessee. * * * The decisions of this " Court cited by counsel on this point lend him no " support, for in those cases the property held liable " to ordinary taxation was neither granted lands nor " property devoted to railroad uses, and in every one " of those cases the statute construed extended, in " accordance with the uniform legislative policy, the " commuted system of taxation to granted lands as well " as to railroad property.

> " County of Ramsey vs. Chicago, M. & St. " Paul Ry. Co., 33 Minn., 537 (24 N. W., " 313).
>
> " County of Todd vs. St. P., M. & M. Ry. " Co., 38 Minn., 163 (36 N. W., 109).
>
> " State vs. Northern Pac. R. Co., 39 Minn., " 25 (38 N. W., 635).

" *Our conclusion is, that* under the provisions of " Sp. Laws of 1865, Chapter 8, *these lands are not* " *subject to taxation in the ordinary way in which other* " *lands in the State are taxable.*

" In the light of experience it is probably very un- " fortunate that the legislature, in dealing with the " various land-grant railway companies, did not im- " pose some reasonable limitation as to the time dur- " ing which this immunity of the granted lands from " ordinary taxation should continue. But, if the state

" made injudicious contracts, the mistake is remedi-
" less now."

The Court then took up the contention of counsel for the relator that the provisions of the acts in question were unconstitutional so far as they exempted the granted lands from taxation like other lands in the State, and the Court says at page 162:

" There is nothing in the suggestion that such laws
" may be held valid as to the taxation of property
" devoted to railroad purposes, but void as to the tax-
" ation of the granted lands. The provisions of the
" laws as to taxation must be all valid, or all void, and
" for two reasons: First, the percentage of the gross
" earnings of the road is a tax on both the road and
" the lands, and not the road alone; and, second, the
" vice, if there be one, in the commuted system of tax-
" ation, would apply to the one class of property as
" well as the other. If there is anything in counsel's
" point both classes of property must, under the con-
" stitution, be taxed according to its true value in
" money."

The Court thus plants itself squarely upon the position taken in the previous cases in the Supreme Court of Minnesota and in the subsequent case of *McHenry vs. Alford*, in 168 U. S. *(supra)*, to the effect that lands granted in aid of the construction of the railroad are taxable as part of the railroad system and that the tax must be valid as a whole or void as a whole.

The Court then proceeds to point out the far-reaching consequences of the attack made upon the constitutionality of this method of taxation of railroad property, and declines to pass upon the question, holding that whether originally valid or not the legislation providing for such method of taxation was validated by the Constitutional Amendment of 1871.

The Court says upon this subject at page 162:

" The question is one that affects the whole tax
" system of the State. If all such laws are invalid
" the consequences would be most serious, affecting the

" taxation, not only of railroads, but also of mining, " insurance, telegraph, telephone and express com- " panies and the like, most if not all of which have " been taxed for years on the basis of their receipts or " earnings. We do not care to pass upon or consider " a question of such great importance until it is neces- " sary, and we do not think that the question arises " in this case. Conceding without deciding that tax " laws such as we are now considering were invalid " when enacted, still we are of opinion that the effect " of the constitutional amendment of 1871 (article 4, " Sec. 32*a*) was to validate all such laws relating to " the taxation of railway property. To a proper un- " derstanding of the meaning and scope of this amend- " ment it is necessary to consider it in the light of the " previous legislative policy of the State on the sub- " ject. The system of providing for the payment of a " percentage of the gross earnings of the road in lieu " of all other taxes on 'railroad property,' and on the " lands granted to aid in its construction while owned " by the company, was inaugurated by the territorial " legislatures, and was universally in vogue at the date " of the adoption of the constitution.

" And after that date the state legislatures invaria- " bly assumed that they continued to posses the power " to adopt this system of commuted taxation when " granting lands to aid in the construction of a rail- " road, whether such lands were the absolute property " of the state, or were held by it in trust for that pur- " pose under an act of congress. This was the prac- " tice, not only as to old grants made before the adop- " tion of the constitution, but also as to new grants, " both state and congressional, made after that date.

" Among the congressional grants made subsequently " to the adoption of the constitution, to aid in the con- " struction of railroads in this state, are the act of " March 3, 1865 (13 U. S. Stat., p. 526), increasing the " grant of 1857, to ten sections per mile ; the act of " May 5, 1864 (13 U. S. Stat., p. 64), making a grant to

" aid in the construction of a road from St. Paul to " Lake Superior ; the act of May 12, 1864 (13 U. S. " Stat., ch. 84, Sec. 7, p. 74), granting four additional " sections a mile to aid the construction of a road from " St. Paul and St. Anthony to the southern line of the " state ; the act of July 4, 1866 (14 U. S. Stat., p. 87), " making a grant to aid in the construction of what is " called the Hastings & Dakota Railroad ; the act of " July 2, 1864 (13 U. S. Stat.,, p. 365), making a grant " directly to the Northern Pacific Company to aid in " the construction of its road.

" Among the grants made by the state itself for like " purposes were that of March 6, 1863 (Sp. Laws, 1863, " ch. 4), of swamp lands to the St. Paul & Pacific " Company to aid the construction of a road from St. " Paul to Winona ; the act of February 16, 1865 (Sp. " Laws, 1865, ch. 1), granting swamp lands to aid the " construction of the Southern Minnessota Railroad ; " the act of March 8, 1861 (Sp. Laws, 1861, ch. 1, Sec. " 18), making a grant of swamp lands (to which the " lands here in controversy in part belong) to aid in the " construction of the road from St. Paul to Lake Su- " perior.

" *And in every instance the legislature, in making or* " *transferring the grant to the Railway Company pro-* " *vided for the exemption of the lands from ordinary* " *taxation while owned by the company, in considera-* " *tion of its paying to the state, annually, a certain per-* " *centage of the gross earnings of the road.* They " provided for the same system of taxation for the " Northern Pacific Company, which received its grant " directly from congress (Sp. Laws, 1870, ch. 65, " Sec. 1).

" In brief, the legislature assumed that, when making " a grant of lands to aid the building of a railway, or " in executing the trust where lands had been granted " to the state by congress for the same purpose (and " which, while thus held by the state, either as pro- " prietor or in trust, were, of course, not subject to

" taxation), it had the power, in the furtherance of the " object for which the grant was made, to exempt such " lands from ordinary taxation, and to provide for " commuted taxation of both the railroad and the " granted lands.

" *There is not in the history of the state a single* " *grant of lands to aid the building of a railway where* " *this system of commuted taxation has not been* " *adopted*, and we have not found an instance prior to " the adoption of the constitutional amendment of " 1871 (Const., Art. 4, Sec. 32*a*), where a commuted " system of taxation was provided that did not apply " to a land grant as well as to the railroad property. " *This amounted to a legislative construction of the con-* " *stitution, which of itself would be entitled to great* " *weight.*"

In the first tax law passed after the adoption of the Constitution (Ch. 1, Gen. Laws, 1860), the Legislature in Sec. 2 made a provision by which the taxpayer could offset against the assessments of credits any indebtedness which he might owe. Although this provision would be unconstitutional according to a technical and literal reading of Section 3, Art. IX., *supra*, and had been so decided in Ohio before the adoption by the State of Minnesota of this section (*Exchange Bank of Columbus vs. Hines*, 3 Ohio St., p. 1) it has always remained a feature of the tax laws of the State. It has been in force and universally acted upon for thirty-eight years.

In 1872, amended in 1876, the Legislature passed an act for the taxation of insurance companies by a percentage of premiums in lieu of other taxes on all real and personal property. See Gen. Stat., 1878, Sec. 315, p. 433. Taxation of insurance companies by the same method has prevailed ever since without question.

Thus Minnesota had a system of railroad taxation of forty years' standing, a system of taxation of insurance companies twenty-five years old, the validity of which has passed unquestioned until recently. Not only the

Legislature, but the Governor, the Courts, every branch of the State government, and the people themselves have by this long-continued practical construction treated these acts as valid. A Constitution may acquire a construction or meaning by universal and long-continued practice which should be held controlling. (*Carson vs. Smith*, 5 Minn. (Gil.), 61; *Green vs. Knife Falls Boom Corporation*, 35 Minn., 161, 162; *City of Faribault vs. Misener*, 20 Minn. (Gil.), 352; *Ames vs. Railway Co.*, 21 Minn., 288, 289.)"

Curryer vs. Merrill, 25 Minn., 1:

In the Curryer case the State had entered into a contract with D. D. Merrill to furnish text books; the act provided that the books should be used in all the public schools, except that it should not be obligatory upon boards of education acting under special charters. The question presented was whether the law conflicted with any constitutional provision inhibiting or limiting legislative power upon this subject. The provision of the Constitution considered is found in § 1 of Article 8:

" It shall be the duty of the legislature to establish a " general and uniform system of public Schools."

It was contended that the last clause compelled uniformity of text books, and that the statute under consideration violated this requirement by excepting certain school districts from its operation. The Court say on page 6:

" But the principle of uniformity is not violated if " the system which is adopted is made to have a gen- " eral and uniform application to the entire state, so " that the same grade or class of public schools may " be enjoyed by all localities similarly situated."

" Irrespective of these considerations, however, it is " certain that the imposition of a duty is not a limita- " tion of power."

We have thus shown the condition of the law in the State of Minnesota up to 1894, constituting an un-

broken line of legislative and judicial precedents in favor of the system of commuted taxation covering railroads and land grants.

In 1895 was passed the act which is relied on by the State in this case as repealing the provisions of the Acts of the Legislature under which the St. Paul and Duluth Railroad and the Northern Pacific claim the right to commuted taxation, and in the case at bar the Supreme Court of Minnesota arrives at the startling conclusion that the acts in question, notwithstanding the legislative and judicial precedents of forty years in their favor, were void *ab initio* as violating the Constitution of the State of Minnesota, and that, while validated by the Amendment of 1871, they were, by the terms of that amendment, subject to repeal in the manner therein pointed out.

We submit that the construction placed upon the Constitution of the State for forty years and approved and acted upon by the Legislature and the courts cannot be thus suddenly and ruthlessly upset because the present members of the Supreme Court of Minnesota may think that these precedents were unwisely or injudiciously established.

Certainly this Court will not sanction such a complete revolution in the jurisprudence of the State of Minnesota where it operates to interfere with vested interests and to impair contract obligations. In deciding this cause this Court will take the law of Minnesota as it had been declared prior to the decision in the case at bar. That law was thoroughly settled without a single break or exception.

In *Chicago vs. Sheldon*, 9 Wall., 50, it is *held* that under an ordinance granting to the North Chicago City Railway Co. the right to construct a railway upon certain conditions, the railway company was not liable for curbing, grading and paving the streets, but only for repairs, the Court saying, per NELSON, J., at p. 55 :

" We may add, also, that the learned Judge who de-
" livered the opinion of the Court, maintaining the lia-

" bility of this company to the payment of the assess-
" ment, does not place his opinion upon the ground
" that the contract did not exempt it, but that the
" legislature were disabled by the constitution of the
" State from conferring any such power on the City.
" The objection is founded on the clauses of the con-
" stitution, which provide that taxes shall be levied
" so that each person shall pay in proportion to the
" value of his property ; and, that where corporate
" authorities of counties, cities, &c., are authorized to
" levy and collect taxes for corporate purposes, the
" taxes shall be uniform in respect to persons and
" property.

" We are not concerned to deal with these
" provisions, as it is perfectly settled by the decisions
" of the Supreme Court of the State that, according
" to the true construction of them, they do not forbid
" the Legislature commuting with individuals or
" corporate bodies the burdens of general or specific
" taxes or assessments, of the character of those in
" question, for what they may deem an equivalent.
" This has been so frequently decided that we need
" only refer to the cases. It is supposed by the
" counsel for the city that this doctrine has been
" modified by the recent cases of Chicago vs. Larned,
" decided in 1864, and The Same vs. Baer, in 1866.
" But, on looking into these cases, we find no references
" to the cases above cited, or to the doctrine they
" maintain. If it were otherwise, however, we could
" not agree that such decisions could have the effect
" to invalidate the contract in question. A contract
" having been entered into between the parties, valid
" at the time, by the laws of the State, it is not
" competent even for its Legislature to pass an act
" imparing its obligation, much less could any decision
" of its Courts have that effect."

Considering the long-continued practical construction and the disastrous consequences, both to private property and to the public, of at this date holding such legislation invalid from the beginning, it is proper and

wise to so construe the constitutional provisions as to validate rather than to invalidate the legislation.

The particular difficulty in construing the Constitution arises from the fact that the State of Minnesota adopted two provisions which, if read technically and literally, are apparently contradictory of each other. Section 1 says that all taxes shall be as nearly equal as may be, and all property *on which taxes are to be levied* shall have a cash valuation and be equalized and uniform throughout the State. It is entirely well settled, as we shall endeavor to show, that under this section the Legislature is clearly given the right to determine what property shall bear the burden of taxation, to classify property, and to levy taxes upon one class of property by a different rule from that applied to other classes of property; it may exempt from all taxation any property or any class of property, or it may, for example, tax improved property by a percentage on rental or income, unimproved property directly by ascertaining its value. This constitutional provision is the common one adopted in the constitutions of a dozen or more Western and Southern States. On the other hand, Section 3 did not accompany in any of the other States constitutional provisions similar to those contained in Section 1. Section 3 was adopted with slight changes from Ohio (see Debates Constitutional Convention 1857), but in Ohio Section 3 was the only provision touching the subject. The constitutional convention of Minnesota adopted Section 1, which is substantially the Constitution of Wisconsin, Illinois, Iowa, Missouri, Kansas and other States *accompanied with* Section 3 taken from Ohio.

In the Constitution of Minnesota the two provisions must be construed together, both as operative and as modifying each other. Some construction must be adopted which will give the fullest effect to both Section 1 and Section 3.

While it must be admitted, as was decided in *Le Duc vs. Hastings*, 39 Minn., 110, that the Legislature cannot exempt any property except of classes enumerated in Section 3, still it remains to be decided whether, taking both sections together, the Legislature is absolutely bound to assess *all property* by a specific, direct appraisal of its value in money.

It may be pertinently pointed out that Section 3 is not self-executing, but is directory to the Legislature. It says that laws shall be passed, etc. Suppose the Legislature fails to pass any law taxing mortgages, for example, it could not be contended that mortgages were taxable. Neither, we apprehend, would this Court decide that all the taxes assessed in the State were void because the Legislature had not passed a law taxing mortgages. And, therefore, it may well be held that Section 3 was not intended to overrule Section 1 so far as concerned the power of the Legislature to determine where the burdens of taxation should be placed (of course, without unjust discrimination) and to classify property into different classes for the purposes of taxation.

Take, for example, a railroad; it has no market value; there are no purchasers; so much money may be invested in it that no person or aggregation of persons would furnish the capital to buy it. Yet it has a value as a system or entity which can best be determined by its earning capacity. The same is true of the property of any corporation which is incapable of separation from the corporate franchises with which it is used, the whole constituting a taxable entity with a value depending on earning capacity, or at least which the Legislature *may* determine by earning capacity.

The determination of value of improved real estate by rental and a taxation by percentage of the rental could not, we submit, be held not to be a constitutional assessment according to value. It is an elementary principle of political economy that rental or earning capacity is one of the very best tests for

determination of value. And, in order to hold that taxation of a railroad by an annual percentage of gross earnings is not taxation of the property according to its value, the Court must overrule this fundamental principle and say that earning capacity may not be taken as a test of the value of property difficult or impossible to determine directly. The Court must hold the very narrow view that no appraisal is based on value, except the ordinary direct and specific assessment of value; when we all know, as a fact, that as to all property operated under and with franchises earning capacity is the best index of value.

See

People ex rel. R., W. & O. R. R. Co. vs. Hicks, 105 New York, 198.
People ex rel. Buffalo & State Line R. R. Co. vs. Barker, 48 N. Y., 70.
Pittsburg, &c., Ry Co. vs. Backus, 154 U. S., 421.
Western Union Tel. Co. vs. Taggart, 163 U. S., 1.

If this is true with respect to taxation of railroads, it is true of the taxation of these land grants as a single entity with the railroad. These grants were universally made to aid in the construction of some railroad. The lands were held upon a trust created by act of Congress for the purpose of aiding the construction of the railroad. Neither the lands nor their proceeds could lawfully be applied or used for any other purpose whatever. While held on this trust they could not be made productive; they could not be built upon, cultivated, improved and made a source of income to the company; they were necessarily held for sale, the proceeds of sale to be devoted to railroad purposes strictly, including the purpose of paying off the mortgages, the money raised upon which had constructed the road. The lands could not be sold and the proceeds appropriated by the stockholders in the way of dividends or otherwise. They are

wedded to and inseparable from the railroad itself. Without them coupled with the commuted taxation, the road might not have been built. *The railroad earnings are produced partly by the lands, because the value of the lands has already been borrowed thereon and put into the road ; the lands are and must continue to be held to aid the road and enable it to produce earnings* (see *McHenry vs. Alford*, before cited, and *State vs. Luther*).

The tax on gross earnings is therefore a tax on the land grant, for the money borrowed on the land grant represents it, and a tax on the earnings of that money is a tax on the earnings of the land grant and on the land grant itself.

Even if the property were not mortgaged, the land grant would be represented by the contribution of stockholders, which would be secured by the land grant as well as by the railroad property created by the stockholders' money.

We deem it hardly necessary or profitable to go into any detailed examination of the decisions made under the Constitutions of other States. A reference to some of the decisions, however, may be of value as throwing light on the common-sense construction placed by the courts upon constitutional provisions relative to taxation.

It has been repeatedly held that constitutional provisions requiring property to be uniformly assessed or taxed, or requiring property to be assessed at its actual value, similar to those under consideration, do not prohibit a Legislature from commuting a tax or contracting for its release for a consideration.

Burroughs on Taxation, 66.
Cooley's Constitutional Limitations, 463 top paging, 4th Edition.
Hunsaker vs. Wright, 30 Ill., 146.

The Constitution of Tennessee of 1834, by Section 28 of Article 2, provided: "*All property shall be taxed*

" according to its value, that value to be ascertained in " such manner as the legislature shall direct, so that the " same shall be *equal and uniform* throughout the " State. No one species of property from which a tax " may be collected shall be taxed higher than any " other species of property of equal value."

Yet, the decisions of the Supreme Court of Tennessee and of this Court have been uniform to the effect that, notwithstanding this provision of the Constitution, the Legislature of Tennessee had the power to grant to corporations created by it exemption from taxation, either total or partial, and for any length of time the Legislature might deem proper.

Knoxville, &c., R. R. vs. Hicks, 9 Baxter, 445.
State vs. Butler, 9 Lea, 400 ; 86 Tenn., 614.
University of the South vs. Skidmore, 87 Tenn., 155.

These decisions are cited and followed in *Mobile and Ohio R. R. vs. Tenn.*, 153 U. S., 486 and 499.

In *Mississippi Mills vs. Cook*, 56 Miss., 40, it is held that under the language of the State Constitution that " Taxation shall be equal and uniform through- " out the State. *All property shall be taxed in propor-* " *tion* to its value, to be ascertained as directed by " law," the words " all property shall be taxed in pro- " portion to its value " do not require that *all* property shall be taxed and deny the Legislature the right to exempt any.

We again call the attention of the Court to the point that we do not, in this case, claim an exemption from taxation, but only the right to a commuted method of taxation, and hence do not need to establish the proposition to the extent laid down in the Tennessee and Mississippi cases.

In the later cases in Tennessee, arising under the Constitution of 1870, the Courts have held that the language of this Constitution is so peremptory that the Legislature must tax all property except that espe-

cially exempt by the Constitution itself, yet even under this Constitution it has been held that railroad property may be taxed upon the basis of earnings and need not be taxed as so much land.

Louisville & Nashville R. R. Co. vs. State of Tenn., 8 Heiskell, 664.

In *Louisville and New Albany R. R. Co. vs. The State*, 25 Ind., 177, the Court construed the provisions of the State Constitution, that "The General Assembly " shall provide by law for a *uniform and equal rate* of " assessment and taxation; and shall prescribe such " regulations as shall secure a *just valuation of all prop-* " *erty*, both real and personal, excepting such only for " municipal, educational, literary, scientific, religious " or charitable purposes, as may be specially ex- " empted by law."

The statute in question provided for valuing the property of a railroad in view of its location, the competition of other roads, its earnings and its condition for present and future business. It also provided that its rolling stock should be included in such valuation. The Court *held* that the rolling stock was so intimately connected with the purposes and uses of the railroad track that it could be properly treated as realty for the purposes of taxation.

The Court further says (at p. 180):

" It is objected that this requires a special method " of appraising the real estate of railroad companies " and contravenes the provision of the Constitution " last cited. But the Constitution does not require a " uniform method of valuation of property, but only " ' such regulations as shall secure a just valuation of " ' all property, both real and personal.' The Legisla- " ture must use a discretion as to the best method of " securing a just valuation of property; and, unless the " method adopted be clearly inadequate to secure that " result, we cannot question its action. The elements " that make up the value of a railroad are not identical

" with those that give value to other property, and it " is certainly proper to take into account, in estimat- " ing such value, every consideration enumerated in the " Statute."

In *Missouri River, Fort Scott & Gulf R. R. Co. vs. Morris*, 7 Kan., 210, it was held that an act providing that the entire road shall be assessed as a whole, and apportioned to the different counties, townships, &c., through which the road runs, is not unconstitutional under the State Constitution, which provides that "The Legislature shall provide for a uniform and " equal rate of assessment and taxation."

The Court say, per VALENTINE, J. (at p. 222): "A " railroad is an entire thing, and should be assessed as " a whole. It would be almost as easy and as reason- " able to divide a house or a locomotive into portions " and assess each portion separately as to divide a rail- " road into portions and assess each portion of it separately."

Followed and approved in *Francis vs. A., T. & S. F. R. R. Co.*, 19 Kan., 303, opinion by BREWER, J.

In *Illinois Central R. R. Co. vs. County of McLean*, 17 Ill., 291, it was *held* that it is within the constitutional power of the Legislature to exempt property from taxation, or to commute the general rate for a fixed sum, and that the provisions in the charter of the Illinois Central R. R. Co., exempting its property from taxation, upon the payment of a certain proportion of its earnings, are constitutional.

The Constitution of Pennsylvania provided that " all " taxes shall be uniform upon the same class of sub- " jects, within the territorial limits of the authority " levying the tax, and shall be levied and collected " under general laws." *Held* in *Kitanning Coal Co. vs. Commonwealth*, 79 Penn. St., 100, that an act taxing coal companies upon their franchises according to the amount of coal mined was constitutional.

Under the Constitution of the State of Wisconsin, which provides that " the rule of taxation shall be uni-

" form, and taxes shall be levied upon such property " as the Legislature shall prescribe," is was held, overruling previous decisions to the contrary and reverting to the rule originally laid down by the Supreme Court of the State, that the Legislature has power to prescribe not only the property to be taxed, but the rule by which it shall be taxed, and that this implied the power to exempt.

Wisc. Central R. R. Co. vs. Taylor County, 52 Wis., 37.

In *Louisiana State Lottery Co. vs. City of New Orleans*, 24 La. Ann., 86, it was *held* that the Legislature has the power to commute the taxes imposed on a corporation created by it, and thereby to relieve it from the payment of all other licenses or taxes by the State itself or by any municipality. The exemption of the Lottery Company, in its charter, from the payment of all other taxes and licenses, on its payment annually into the State treasury of a certain amount for the benefit of the school fund, is not in conflict with the constitutional provision for equality and uniformity in taxation.

In *City of New Orleans vs. Davidson*, 30 La. Am., 554, it is said that " the constitution requires that taxa- " tion shall be equal and uniform, and that all property " shall be taxed in proportion to its value. It confers " upon the General Assembly the power to exempt " from taxation property actually used for church, " school or charitable purposes, and the power to levy " an income tax upon all persons pursuing any occu- " pation, trade or calling, and such tax shall be *pro* " *rata* on the amount of income or business done. The " General Assembly, by Act of March 16, 1870, ex- " empted from taxation every income which shall not " exceed one thousand dollars a year, and household " furniture to the value of one thousand dollars.

Held, not unconstitutional.

MANNING, C. J.: " Perfect equality of taxation is in-

" attainable. A tax on property by valuation is the " fairest mode, but that cannot be apportioned or col- " lected with absolute justice. It is not essential to the " validity of taxation that it be levied according to " rules of abstract justice. * * * So also exemp- " tions, either by failing to include the exempted prop- " erty in the subject of taxation, or by excluding them " by designation, do not necessarily destroy the equality " or uniformity of taxation."

In *City of New Orleans vs. Tomley*, 30 La. Ann., 910, it was *held* that exemptions were valid.

The Court says (at p. 913), per SPENCER, J.: " SECOND. But if defendant's argument is good, all " these exemptions, except those for churches, schools " and charitable purposes, are unconstitutional, for he " maintains that by the Constitution of 1868, '*all prop-* " *erty*' *or none must* be taxed; and he cites Article 118, " which, as seen, declares that 'all property shall be " ' taxed in proportion to its value, to be ascertained as " ' directed by law.' We do not construe that clause as " does the defendant. It simply means that the taxa- " tion of all property subject to tax shall be *ad valorem*. " That specific taxes shall not be levied on property."

In *State vs. North*, 27 Mo., 464, it is said by the Court (at p. 483): " The 19th section of the bill of rights, " which declares that all property subject to taxation " in this State shall be taxed according to its value, has " been repeatedly construed by this Court to mean not " that all the property in the State must be taxed, but " that, when any article of property is selected for tax- " ation, it shall be taxed in proportion to its value, and " not specifically; and the general assembly may, " therefore, not only levy an *ad valorem* tax on the goods " of merchants, but may also impose a tax on their oc- " cupation, to be collected in the form of a license."

The right of the Legislature to treat the lands cov- ered by the land grants as constituting a different class of property from ordinary lands is manifest when

we consider the title under which the railroad holds those lands. They were originally owned by the sovereign as represented by the United States of America, and subsequently by the State of Minnesota. While so held they were, of course, not subject to taxation. They were granted to the railroad company in the aid of construction of the road, and for a public purpose. The railroad company, in receiving them, received them subject to a trust, to use the proceeds in the construction and operation of its road. The public right and interest in the lands, therefore, still continued, and there was, therefore, a special reason why those lands should not be subject to the ordinary taxation imposed upon private property. That the Legislature has the right to make appropriations for the benefit of a railroad enterprise, and to pledge the public faith and credit therefor, is too well settled to need citation of authorities. If instead of appropriating money the Legislature appropriated lands, this is but another form of accomplishing the same result. If in appropriating lands they appropriated them with a proviso that they shall not be taxed except as part of the railroad system and on a commuted basis, this, also, is but another mode of accomplishing the same result (see authorities cited under next Point).

THIRD POINT.

The land grant lands of the St. Paul and Duluth Railroad Company are not subject to the operation of Sections 1 and 3 of Article IX. of the Constitution of the State of Minnesota.

The lands of the St. Paul and Duluth Railroad company are derived from two sources, one, a Congressional land grant to the State for railroad purposes, and the other, a swamp land grant; as to both of these grants, the State of Minnesota was a mere trustee.

The congressional grant could not be taxed until the lands had been conveyed to the railroad company.

The swamp land grant, while it might possibly by a violation of the trust be diverted and become the property of the State before being turned over to the ultimate anticipated beneficiary, could not be taxed until conveyed to some one, except by the State taking from the State Treasury the money with which to pay the tax, which would add nothing to the total tax revenue of the State, and would be against the well-settled policy of the State; consequently, not a dollar could be derived in the shape of taxation from the congressional grant, nor from the swamp land grant, which could be added to the total tax revenue of the State, until some person or corporation assented by express terms, or by implication, to a condition with reference to ownership of these lands which would place them where, independent of any State legislation, they could become the subject of taxation for the purpose of enhancing the revenues of the State. In other words, neither class of lands, under the law and under the policy of the State, could ever become a part of the taxable domain of the State until some one, other than the State, consented thereto, by accepting the lands under a contract with the State of Minnesota.

The State not only could, but under the spirit of the Federal grants was under an obligation to see that the lands in the disposition thereof served the purpose for which they were granted, namely, the development of the enterprise sought to be developed through the use of the grant.

The State was a trustee charged with the duty of executing a trust, dedicating these lands, within the purview of the Federal grant, to the purpose for which

they were designed, and could not tax the lands until, under some contract, they passed into the hands of some one willing to accept them under such contract.

No one will contend but what it would have been perfectly competent for the Legislature, in making either the grant of swamp or congressional lands, to have provided that the State should retain the title, not only until the lands were earned, but until individual purchasers were found by the company, and that it would have been competent, in such case, not only to have provided for a commuted form of taxation between the time when they were earned and the purchaser was found, but an absolute exemption until a purchaser was found. In fact, it is not the use of a land grant that is the inducement for its acceptance and the construction of a railroad in consideration thereof, but it is the ultimate proceeds to be derived from the sale thereof.

It is true that the grant earned and unearned may be the subject of a mortgage, but it could just as well be the subject of a mortgage under the proposition above stated.

When once a contract is made for a grant of lands with the State, the title remaining in the State, and the contract is complied with by the company, for all practical purposes it derives the same benefit that it does upon a grant being conveyed to it. It is not the use of the land, but their ultimate proceeds, that is the consideration and object sought.

Indeed, the purpose of Congress that these lands should be devoted to railroad development cannot be effected before the lands are sold by the railroad company, and the proceeds thereof received by it.

If the State could have entered into the contract above suggested, it could accomplish the same result by a contract similar to the one under consideration, and we rest this proposition upon this principle:

These lands never became—and there was no possibility by which they could become—a part of the

public domain for taxable purposes, except by the terms of a contract; and, as in the case at bar, the contract contained the provision relative to taxation, they are not, until they pass beyond the range of that contract, within the purview of Article 9 of the State Constitution. Not only does this argument rest upon the clearest legal principle, but it is supported by authority.

The People vs. Auditor General, 7 Mich., 84, which is an authority in support of this contention, goes beyond that which we contend for, as in that case there was no pretense of a commuted tax, or a tax in lieu of the exemption, but there was an absolute unqualified exemption in the form of an abatement. In the case cited, the land was granted by the Federal Government to the State of Michigan for the construction of a ship canal. The State Legislature authorized the Commissioners to let the contract for the construction of the canal, and in their discretion to contract that any taxes to be assessed on the lands donated for that purpose should be remitted, for a period not exceeding five years, to the person or persons taking the contract; and provided that, when any land should be sold by the contractors, it should become subject to taxation. Two questions were involved:

First, whether the act providing for the remission of taxes was constitutional.

Second, whether the lands under consideration had been sold.

Upon the first proposition, the one now under consideration, the Court say:

"It is evident from a consideration of these acts "that the land never was a part of the public domain "of Michigan, either by grant from congress or by "sale to a purchaser, before the passage of the act in "question, so that the right of taxation had accrued "to the state. The state had power to contract with "the company to convey the lands after five years, and

" thus relieve them during that period from taxes, and " if it might do this it is difficult to find a reason why " it might not so convey them as to secure the same " exemption from taxation."

The principle that lands, as to their taxability, may be held in abeyance by the State, is found in the Parcher case (14 Minn., 253) and in the cases of *Minnesota vs. Winona & St. Peter Railroad, 21 Minn., 315*, and *State vs. Winona & St. Peter Railroad, 21 Minn., 472.*

In fact, in all the cases where the exemption has originally rested upon a contract entered into before the Constitution was adopted—take, for instance, the Parcher case—the lands were exempted by a law passed before the adoption of the constitution. When the Constitution was adopted these lands practically, so far as their taxability was concerned, were as exempt from taxation as the Congressional or swamp-land grants held in trust by the State and covered by the contract with the companies in the case at bar.

The lands. having this condition appurtenant thereto, passed to the State by foreclosure, and were afterwards conveyed to the grantee of the State by acts of the Legislature. When so conveyed the exemption inuring to the grantee inured, not by virtue of a contract made before the State Constitution was adopted, but by virtue of a contract entered into between the grantee and the State of Minnesota after the Constitution was adopted, whereby the State granted the lands with the exemption because the Territorial acts and foreclosures vested the lands, not in the grantee of the State, but in the State itself, subject to disposition by the State. If the Legislature, then, after the adoption of the State Constitution, could make a contract with the company granting to that company lands with an exemption that existed, not by any right of the company, but by virtue of the power of the State to keep alive and convey such exemption, it follows, without argument, that the State could do

precisely the same thing with the Congressional or swamp-land grant which was not subject to taxation at the time the contract between the State and the companies was made.

This position is indicated in State vs. Luther, p. 164, where the Court refers to the fact that the Legislature assumed, in making a grant of lands to build a railroad, or in executing a trust created by Congress, that it had the power, in furtherance of the object for which the grant was made, to exempt such lands from ordinary taxation, and to provide for the commuted taxation for both the railroad and the granted lands.

In *Wisconsin Central R. R Co. vs. Taylor County*, 52 Wis., 37, the Court *held* not only that the Legislature had authority under the Constitution of the State to select the subjects of taxation, but also (see p. 96): "(10) While the lands described were held (by the "State) in trust for the building of the proposed line "of road now owned by the plaintiff, and hence not "subject to taxation, the Legislature had the power, in "furtherance of that object and in execution of the "trust, to exempt the same from taxation for a term "of years." Of course, the power to exempt for a term of years would imply the power to exempt perpetually, so long as held by the railroad company.

In *People vs. Auditor-General*, 7 Mich., 84 (above cited), the Court upholds the right to grant exemptions from taxation, notwithstanding a constitutional requirement that "the legislature shall provide an uniform "rate of taxation, except on property paying specific "taxes."

The Court further *held* that lands granted by the United States to the State to aid in the construction of a ship canal around the Falls of St. Mary's were granted in trust for this purpose. "Instead of selling "the lands, and appropriating the avails towards the "construction of the canal, the Legislature found it "desirable, if not necessary, to appropriate the lands "themselves. From the course of legislation we may

" presume that this appropriation of the lands was " found to be insufficient of itself to induce any one " to undertake the work, and that in order to render " it sufficient, the State authorized the contract for the " remission of the taxes thereon. *This authority was* " *given and the contract executed, while the lands were* " *in a condition in which they could not be taxed, and* " *until such right of taxation had accrued to the State it* " *was not within the scope of either its constitutional or* " *legislative provisions.* The State had power to con- " tract with the company to convey the lands after five " years and thus relieve them during that period from " taxes, and if it might do this it is difficult to find a " reason why it might not so convey them as to secure " the same exemption from taxation. In making this " contract the State acted as the trustee of the Gen- " eral Government; in the law authorizing the con- " tract it was dealing with the subject of the trust, " over which no right of taxation then existed."

In *Portland vs. Water Co.*, 67 Maine, 135, it was held that it was within the constitutional authority of the Legislature to empower the City Council of Portland to exempt from taxation for a term of years property of the Portland Water Company, in consideration of an undertaking and agreement by the company to furnish, free of cost to the city, a supply of water for its public and municipal purposes.

The Constitution provided that " all taxes upon real " estate, assessed by authority of this State, shall be " apportioned and assessed equally, according to the " just value thereof."

The Court say (at p. 137): " We are not satisfied " that the Legislature cannot, by charter or contract, in " any case and under any circumstances, release one " corporation from taxation, merely because it does not " include in its exclusion from taxation all similar " corporations in the State.

" The property of the defendants has been appro- " priated and devoted to a public use and may be ex-

" empted from taxation for the same reason that town " houses and school houses and railroad tracks are " exempted. It was only because their works were " public works that they would be permitted to take " land for their purposes under the exercise of the " right of eminent domain. True, the title of the prop- " erty is vested in the corporation. But the corpora- " tion holds it, to some extent, as a trustee for the " public. It must be used for the public, and in a " great measure, its use may be controlled by the " public."

In *State of Arkansas vs. County Court of Crittenden County*, 19 Ark., 360, it was held that lands granted by Congress to the State for the purpose of enabling the State to construct levees and drains to reclaim the swamp and overflowed lands therein and sold by the State with an exemption from taxation for ten years or until said lands are reclaimed were protected by the contract of the State from taxation during the period named, and an Act of the State Legislature taxing them was repugnant to the U. S. Constitution and void.

It was further held that the exemption was not repugnant to the Constitution of the State to the effect that " all property, subject to taxation, shall be taxed " according to its value," and that " no one species of " property from which a tax may be collected shall be " taxed higher than another species of property of " equal value."

In *First Division of St. Paul and Pacific R. R. Co. vs. Parcher*, 14 Minn., 297, it is said (at p. 304): " As " a recipient of the Congressional Land Grant, the " State had assumed a trust which good faith and pub- " lic interest required to be discharged in the way most " likely to accomplish its purposes. That it was neces- " sary to hold out great advantages in order to induce " parties to enter upon and prosecute the construction " of the roads, is matter of history. The long delays " and repeated discouragements which the people of

" this State experienced in their attempts to secure " convenient communication with the markets of the " country are familiar to all."

And again, at page 330 : " It is entirely proper for us " to refer to the state of things existing when the " policy to be adopted was under consideration by " the Legislature. The State was then almost a " wilderness. Its population was small and sparse, its " capital limited, its business depressed, its resources " undeveloped. There was not a mile of railroad " within its borders. An outlet by rail for the prod- " ucts of the State was a matter of prime and pressing " necessity. The inducements which we were able to " hold out to secure this outlet and the construction " of needed lines of railway consisted rather in what " the State was to be than in what it was. The " country at large had hardly recovered from the " financial revulsion of 1856–7. How soon railroads " in this State would prove remunerative to their " onwers, as well as how soon the lands would sell, " were matters of conjecture and experiment. And " notwithstanding repeated and continued tenders of " all the roads, lands and franchises, together with the " privileges and exemptions in regard to taxation, it " was not until the summer of 1862 that the first ten " miles of railway were put into operation in this " State. These facts are not without weight in con- " sidering whether the grant of lands, without the ex- " emption from taxation, would probably have induced " capital to undertake the construction of the roads, " especially when we take into account the proverb- " ially high rates of taxation in newly settled com- " munities."

These lands were not subject to taxation by the State as long as they remained public land. The grants made by Congress could not be taxed by the State until after they passed into private ownership. So long as they remained public lands they were not subject to the taxing power of the State nor to the

limitations on that power expressed in Article IX. of the Constitution. These limitations related to private property only. Now, in order to get a private corporation to build a road, the State found it necessary to make a certain contract ; it accepted the construction of the road and payment of taxes based on its earnings, and granted in consideration thereof the lands free from any other taxation until the company was able to sell them. Thereby the rights, immunity, or privilege to pay taxes only according to earnings was impressed on the land while it was yet public property. Subject to that privilege or immunity it passed into private ownership. The immunity attached to the title before the company accepted or earned the lands. The constitution, we submit, was not intended to prevent the State from making such bargains as to its own public domain or as to Government land within its borders, if it found such contracts reasonable and necessary to secure works of internal improvement. And whether such contracts were reasonable or necessary is, of course, a question which was settled by the Legislature : This was one of the points decided in *People vs. Auditor*, 7 Mich., 84, and in *Illinois Central Railway vs. McLean County*, 17 Ill., 296. We know of no authority to the contrary. This doctrine is evidently consistent with the view which has since the organization of the state been held of legislative power, not only by the Legislature itself but by the executive department, by the courts and by the people. This view, if adopted, renders it unnecessary to construe or define Sections 1 and 3, Article IX. of the Constitution, or to reconcile the conflict between them, which may be found to exist if both are read and construed strictly. It will avoid the disaster, the extent of which no one can foresee or measure, of holding that a large portion of the tax system of the State has been void from the beginning and that a legal tax has never been levied in the State of Minnesota.

FOURTH POINT.

The statutes under which the St. Paul and Duluth Railroad Company claims the right to commuted taxation were not only valid and constitutional enactments of the Legislature of Minnesota, but they constituted irrevocable contracts between the State and those companies.

By the act approved February 23, 1865, the State accepted the trust reposed in it by Congress when the State received the grant of lands to aid in building this road, and, in the same act, as part of the consideration for the acceptance of the State's offer upon the part of the railroad company, it was set forth :

" That, in consideration of lands granted by this act, " and of the lands, rights and privileges and franchises " which have heretofore been granted to said railroad " company, the said company shall, on or before the " 1st day of March of each and every year after said " railroad is completed and in operation, pay into the " treasury of the State three per cent. on the gross " earnings of said railroad, which sum shall be in lieu " and in full of all taxation and assessment upon the " said railroad, its appurtenances and appendages, and " all other property of said company, real, personal " and mixed, including the lands hereby and heretofore " granted to said company or so intended to be."

It further provided that the lands were granted on condition that twenty miles should be completed within three years from July 4, 1865, and the whole line within five years from that date ; also, that the road should deposit $20,000 United States bonds with the State Treasurer, to be forfeited if the company should fail to complete the road within the time fixed. This act was accepted by the railroad company February 25, 1865.

This act and its acceptance clearly constituted a contract between the State and the railroad company. It has all the elements of a contract. There were mutual agreements on the part of the State and the railroad company. The State granted the lands, and it agreed, among other things, to accept three per cent. of the gross earnings of the railroad after it was completed, in lieu of all other taxation upon the property of the company, including the granted lands, provided that the lands should be taxed as other lands after they were sold, contracted to be sold, conveyed or leased; and provided further that they should be taxed as other lands in five years after the railroad company should become entitled to the lands. On the other hand, the railroad company, in consideration of the agreements of the State, agreed among other things to pay to the State the three per cent. of its gross earnings, in lieu of all other taxation, on or before the first of March of each and every year after the road was completed and in operation. It agreed to complete twenty miles of the road within three years from July 4, 1865, and the whole line from St. Paul to Lake Superior within five years from July 4, 1865. It further agreed to deposit $20,000, or that amount of United States bonds, with the Treasurer of the State, to be forfeited if the road was not completed within the time provided in the act. These mutual agreements clearly contemplated a binding contract between the State and the railroad company, and under the terms of this contract the railroad company was not bound to pay any gross earnings tax until the whole line was completed and in operation.

This being the situation, eight days later another law was passed which was an amendment to the Act of February 23, which is the Act of March 3, 1865, being Chapter 8 of the laws of that year. This law changed the terms of the previous act in so far as it related to taxation of the railroad property.

This second act provides that, whenever any lands

theretofore or thereafter granted to the company shall be sold, contracted to be sold, conveyed or leased by the railroad company, they shall be listed for taxation as other real estate; that all acts in relation to the taxation of said lands in conflict with the provisions of this act are repealed, and provides further that during the first three years after thirty miles of said railroad shall be completed the company shall pay to the State one per cent. of its gross earnings, and during the next seven years two per cent., and after the expiration of said seven years three per cent. of its gross earnings, "and the payment of such percentage "annually, as aforesaid, shall be and is in full of all "taxation and assessment."

Section 2 of this latter act contains this provision:

"That upon the filing by the said company, in the "office of the Secretary of State, of a notification of "its acceptance of this Act, the same shall become "obligatory upon the State and upon the company; "provided, that such notification shall be given within "sixty days."

The acceptance and the notification were duly given.

This act was passed and accepted by the railroad company before that company commenced to construct its railroad and the railroad was built upon the faith of it. This is alleged in the answer (fol. 29), and was admitted on the trial (fol. 94).

That this act was intended by the Legislature and the railroad company as a contract is plain. It is enacted in the form of a contract, and Section 2 provides that it shall become obligatory upon the State and the railroad company upon the company filing its acceptance of the act in the office of the Secretary of State, and the meaning of the act is that the granted lands of the company shall not be taxed as other lands until contracted to be sold, conveyed or leased, and that the payment of a percentage therein provided should be in lieu of all other taxation of the property of the railroad company, including the granted lands.

The plaintiff in error claims that this law, together with the acceptance of it by the railroad company, constitutes a contract which cannot be repealed or changed without the consent of the railroad company.

It did not need the statutory expression upon the part of the State to the effect, that the filing of the acceptance would make a contract binding equally upon the State and upon the company. The mutual obligation was created by the acceptance of the offer made in the act.

In the clearest terms, and in the most emphatic manner, has the Legislature spoken in Chapters 2 and 8 of the Laws of 1865, with the intention of holding out to the railroad company a sufficient inducement for the great outlay necessary to build the roads. It was the presence of these inducements, of which the land grants were part, that gave to the company the credit which is the life of such a corporation. The filing by the railroad of the acceptance of the conditions imposed upon it by the State made the contract. Then began the work of building and completing the railroad, whereby the lands, as the road advanced, were earned by the company and held or sold for the benefit of the stockholders. The fact is clearly established that the railroad was constructed after the passage of the Acts of 1865, and in reliance upon them. These acts constituted part of the charter of the company, and preceded the acquisition of necessary capital, and gave the company the necessary borrowing power, and security absolutely essential to the construction of the railroad.

It may be said that, especially in the case of a "land grant" railroad is the amount and manner of taxation a matter of affecting the value of its stock and its ability to obtain credit.

The St. Paul and Duluth Railroad Company was organized the 27th day of June, 1877, and succeeded to the property, rights, franchises and privileges of the

Lake Superior and Mississippi Railroad Company on the 19th day of July, 1877, by purchase.

It was conceded below by the respondent (defendant in error here) in his brief, that the doctrine is settled that a State, in the absence of a constitutional provision to the contrary, may irrevocably contract away the right to tax the property of the contractee, and he cited the following cases:

State vs. Wilson, 7 Cranch., 164.
Tomlinson vs. Branch, 15 Wall, 460.
Humphrey vs. Pegues, 16 Wall, 244.
Pacific R. R. vs. McGuire, 20 Wall, 36.
Megee vs. Mathis, 4 Wall, 143.
R. R. Co. vs. Loftus, 105 U. S,, 258.
1st Div. St. P. & P. vs. Parcher, 14 Minn., 224.
State vs. Luther, 56 Minn., 156.

It has been held in the Supreme Court of the United States from the beginning that a State may by contract to that effect, based upon consideration, exempt the property of an individual or corporation from taxation for any specified period or permanently; and that where an act or charter contains an exemption in consideration that taxes shall be paid to a specified amount or upon a particular basis, this arrangement is presumed to be on sufficient consideration and consequently binding upon the State (*State of New Jersey vs. Wilson*, 7 Cranch., 164; *Gordon vs. Appeal Tax Court*, 3 How., 133; *State Bank of Ohio vs. Knoop*, 16 How., 369; *The Jefferson Branch Bank vs. Skelly*, 1 Black., 436; *University vs. People*, 99 U. S., 309; *Asylum vs. New Orleans*, 105 U. S., 362; *Pearsall vs. Great Northern Ry. Co.*, 161 U. S., 662; *Mobile & Ohio Railroad Co. vs. Tennessee*, 153 U. S., 486).

As the greater includes the less, the power of the State, unless restrained by its Constitution, is clear to pass statutes of the character of Chapters 2 and 8, by which a tax on gross earnings is imposed in lieu of all other taxation, thereby effecting not an exemption, but a

commuted form of txation, in which the per centum tax is construed as an equivalent of the tax against all the property itself of the railroad corporation.

The language of the acts in question provides for a contract, which became binding upon the construction of the road. The submission of an act with the provision that its acceptance by the party to whom it is tendered shall make it obligatory upon the State and upon the party is the strongest possible form of enacting a contract between a State and a person or corporation.

At the outset of the discussion of this branch of the case we desire to emphasize the fact that while this system, in common parlance, creates an exemption of the land grant lands, yet there is no exemption, but, as we have already urged, there is a commuted system of taxation which includes a tax upon the land as well as upon all the other property of the company, and this distinction becomes material from the fact that a different rule of construction of statutes obtains where an absolute exemption is granted a corporation from that which obtains where there is no exemption, but a commuted system of taxation. This distinction is clearly made in *City of St. Paul vs. St. Paul & Sioux City R. R. Co., 23 Minn., 469*, where it is said that

" When property is actually exempted from taxation " the statute must be limited in its scope and opera- " tion to the express words of the statute, or within " some necessary implication from its terms.

" When, however, the statute relieves, as in this " case, the corporate grantee of the exemption from no " portion of its just and equal share of taxation in " respect to any of its property, but merely provides a " mode of commutation therefor based upon the per- " centage of earnings or income agreed upon as a just " exaction equally advantageous and beneficial to the " State, this rigid rule of construction must be so far " modified as to harmonize with other well-settled rules " of construction."

That the legislation now considered amounted to a contract in form and terms, and was an agreement for a commuted system of taxtion instead of an absolute exemption, is amply borne out by the decisions of the State of Minnesota and of this Court.

The Supreme Court of Minnesota itself has held that the legislation in question possessed all the elements of a binding contract based upon a valuable consideration and if valid when made, irrepealable and irrevocable.

In *First Division of the St. Paul and Pacific R. R. Co. vs. Parcher*, 14 Minn., 224, the Court overruled the contention that, as the taxing power is a *sovereign* power it is not competent for a Legislature to alienate it. The Court held that the charter granted by the Territorial Legislature in 1857 to the Minnesota and Pacific Railroad Company constituted a contract between the territory and the railroad company, "one of "the terms of which was that the lands granted in "aid of the road should be exempt from taxation till "sold and conveyed by the company. That the ex- "emption thus conferred is a contract right, a right "which a Legislature, in the absence of constitutional "inhibition, is competent to grant, and inviolable, has "been settled in a series of decisions by the Supreme "Court of the United States, so that the matter is not "open to discussion *(State of New Jersey vs. Wilson*, "7 Cranch, 164; *Gordon vs. Appeal Tax Court*, 3 "Howard, 133; *Jefferson Branch Bank vs. Skelly*, 1 "Black, 436, and *cases cited)*" (p. 326).

The Court further *held* that the Territorial Legislature had power to pass the statute and to bind the future State by the contract thereby created.

The Court further say: "It is also urged by the "defendants that the exemption from taxation was "granted to the Minnesota and Pacific Railroad Com- "pany without consideration, and that therefore it "does not come within the principle of the decisions "of the Federal Supreme Court before cited, but is

" rather to be classed among the *privilegia favorabilia*,
" spoken of in *Christ Church vs. County of Philadel-*
" *phia*, 24 How., 300, and may therefore be revoked
" at the pleasure of the sovereign. We are of opinion
" that a sufficient consideration is to be found in the
" agreement of the Company to construct the road,
" and to fulfill the other duties imposed by the charter,
" and among them to pay three *per centum* of the gross
" earnings of the road into the treasury of the Territory
" or future State " (p. 328).

It was further *held* that this immunity from taxation passed by foreclosure, and passed with the lands as appendant thereto.

The State having acquired the property and franchises of the railroad company by foreclosure, took and held what it acquired, not in its sovereign character, but as property, like a private individual, and could and did rightfully transfer the same, including the immunity from taxation, to the St. Paul and Pacific Railroad Company.

This case, therefore, firmly establishes the proposition that such statutes as those under consideration providing for a commuted tax constitute a contract, resting upon sufficient consideration, which the Legislature of Minnesota, in the absence of constitutional inhibition, could make.

State vs. Winona & St. Peter R. R. Co., 21 Minn., 315.

This was a case of an exemption granted before the adoption of the Constitution.

The Court refers to the Parcher case and holds that the constitutional requirement "laws shall be passed " taxing, etc., all real and personal property at its true " money value," did not render void the transfer by the State to the company of the railroad property with the immunity to the land grant from taxation, although the law was passed after the adoption of the Constitution.

In State vs. Winona & St. Peter R. R. Co., 21 Minn., 472, appears a further discussion of the consideration for the contract with the State offered by the company. Speaking of one of the sections of the original act, the Court says, on page 477 :

"This is a contract between the State and Company "and whether it is provident or improvident, each "must abide by it according to its true intent."

And on page 478 it said :

"This three per cent. is provided as a commutation "for all taxes, which, but for the exemption, the com- "pany would have to pay. Further, the commutation "for public burdens imposed upon property was one of "the inducements held out to the company to under- "take the enterprise."

In *C., M. & St. P. R. R. Co. vs. Pfaender, 23 Minn., 217*, discussing the effect of the legislative acts amendatory of the legislative acts of the territory under consideration, the Court said on page 223 :

"By the terms of the section as amended, exemp- "tion from assessments and taxation was granted in "consideration of the annual payment of the specific "per centum of gross earnings. The obligation as- "sumed by the State in making the grant, and that of "the Company in receiving it, to make the required "payment in lieu and in full of all assessment and "taxtion were, in a certain sense, moral and recipro- "cal obligations."

"And it was obviously the intention of the State that "the grant of immunity from taxation should be "treated and regarded as a conditional one, charged "with the perpetual burden of the annual payment "therein provided, so that any company took it sub- "ject to this condition and burden, and the charge."

This language could have no application to anything else than a contract.

City of St. Paul vs. St. Paul and Sioux City R. R. Co., 23 Minn., 469, was an attempt to tax certain lands of the defendant company in the City of St. Paul. The

opinion is a clear and exhaustive discussion of the prin iples involved in the case under consideration. After pointing out the distinction between absolute exemption and a law which does not relieve the company from its share of taxation, but simply provides a mode of commutation therefor, and designating this as an agreement equally advantageous and beneficial to the State, the Court discusses the policy of the State in entering into contracts of this nature, and on page 472 says :

" The policy contemplated as the basis of taxation " the annual gross earnings, instead of an *ad valorem* " assessment of franchises and property, and, instead " of a general and local system of taxation, the pay- " ment of a fixed per centum for the benefit of the " whole state was provided for in lieu of all taxes what- " soever. This it was suggested would prove less " vexatious and burdensome to the companies in the " infancy of their existence, and ultimately more ad- " vantageous and productive to the revenues of the " state, and clearly more just and equal to all locali- " ties thereof. Experience is fast demonstrating the " wisdom of this policy and realizing the expectations " of its founders."

On page 474 the Court takes up the question of legislation subsequent to the adoption of the Constitution, and says :

" The Company held its lands, property, immunities " and franchises under the grant made prior to the " adoption of the Constitution, and, upon the renewal " of the grant in 1864, it was clearly competent for the " legislature to change and modify its terms and " conditions."

It must be borne in mind, in connection with the language above quoted, that the Court is speaking there, not of the power of the Legislature independent of the consent of the company, but of the authority of the Legislature to make this modification with the company of the original contract. A reference to Sec-

tion 9 of the act under consideration there shows that it was made upon the express condition that the grantees accepted the grants, thereby ratifying and confirming the same as tendered in the act in question. The Court then proceeds:

"And the enactment of March 4, 1864, in this re-
"gard, has not only been uniformly recognized and
"acted upon ever since as valid by both the executive
"and legislative departments of state, but by an ex-
"press constitutional amendment adopted in 1871 it
"has been placed beyond the reach of any amendment
"or repeal, except by a law ratified by the vote of the
"electors of the State."

State vs. Northern Pacific, 32 Minn., 294:

Here the Court, speaking of the condition annexed to the grant—to wit, the payment of the gross earnings tax—characterizes it as an "Obligation" (p. 295).

And, in speaking of the act under consideration in the case at bar (p. 299), uses the expression:

"Undoubtedly, the exemption of a railroad in con-
"sideration of a percentum upon its earnings," etc.

County of Hennepin vs. St. P., M. & M. R. R. Co., 33 Minn., 534:

This was an application by the county for a judgment against certain lands for taxes. The defendant company was then paying three per cent. of gross income under a territorial act.

The Court (p. 535) said:

"The effect of this statutory provision is that the
"right to assess a tax upon the land in specie is super-
"seded by the obligation of the respondent to pay the
"three per cent. This is not an immunity from taxa-
"tion but a commutation of taxes, another and substi-
"tuted way prescribed by law, in which the company,
"as the owner of the land among other property, con-
"tributes its share to the public revenue."

County of Ramsey vs. C., M. & St. P. Ry. Co., 33 Minn., 537 :

The Court, on page 540, referring to the Act of 1873, which was accepted by the company, said :

" The corporation having accepted and become sub-
" ject to the provisions of this act, its rights, as well as
" those of the State, are to be determined by it."

And on page 542, say :

" It must be supposed that it was contemplated that
" this system would, upon the whole, fairly effect the
" objects of taxation with respect to such corporations
" and be equivalent in its results to taxation of the
" property owned by them."

St. Paul and Chicago Ry. Co. vs. McDonald, 34 Minn., 195 :

The plaintiff railroad company succeeded to the rights of the Minn. and Pacific R. R. referred to in this case.

The Court said :

" By the charter of this Company a commuted sys-
" tem of taxation was stipulated for, by which in con-
" sideration of the payment of a percentage of gross
" earnings, the lands and other property were to be
" exempted."

This latter case involved the consideration of an act of 1863, modified by Chapter 9 of the Laws of 1865; this latter law contained a provision for its acceptance by the company, and on page 209, after holding that a transaction between the railroad company and a trustee amounted to a sale of the land, the Court said :

" The State should and must, in letter and spirit,
" religiously keep its contract obligations, but the law
" will not tolerate the use of mere forms to evade its
" spirit."

And the Court held that under the instruments which it was held amounted to a sale, the land was, in fact, sold and became taxable.

County of Stevens vs. St. P., M. & M. Ry. Co., 36 Minn., 467:

In 1865 two acts were passed, one March 2d and the other March 4th, which were the subject of discussion in this case. By the act of March 2d, it was provided that the lands should be subject to taxation as soon as sold, leased or contracted to be sold or leased; by the provisions of the Act of March 4th, as soon as any of the lands should be contracted to be sold, they should be placed upon the tax list, but in enforcing the collection of taxes, neither the title of the company nor any trustee should in any manner be affected, but only the interest of the purchaser or lessee should be taxed.

Section 2 of the Act of March 4th provided for the acceptance of the same by the company. On page 471, speaking first of the Act of March 2d, the Court said:

"For the purposes of this case it is unnecessary to "consider what would have been the effect of this en- "actment, if without modification it had been accepted, "for it does not appear that there was any acceptance. "The modification of the right of exemption expressed "in the act of March 2d could only have been made "effectual by the assent of the corporation, for the ex- "emption previously stated was a contract right which "the state alone had any power to impair.

"From the fact as presented in the case, the act of "March 4th appears to have been an offer on the part "of the State of another and a modified term respect- "ing the taxation of the lands, in place of that em- "braced in the contract tendered in the enactment of "two days previous."

In this case the Court reiterates what has been so often stated, that the per centum tax is a tax in lieu of other taxation.

County of Todd vs. St. P., M. & M. Ry. Co., 38 Minn., 163.

The question here was whether lands purchased and turned over to the company came within the tax provisions of its charter, and the Court, on page 165, say:

" It has been considered that the purpose of such " taxation has been, not to exempt property from taxa- " tion, but to provide a substituted method of secur- " ing to the State its proper revenue from the taxable " property of these corporations."

We have here, then, the declaration of the Court that the per centum tax does not relieve the company from its share of taxation, and that the right to tax the land in specie is superseded by the obligation of respondent to pay the per centum tax by which the respondent is to contribute its share to the public revenue, and through Judge DICKINSON the Court says that :

" It must be supposed that it was contemplated that " this system would, upon the whole, fairly effect the " objects of taxation with respect to such corporations, " and be equivalent in its results to taxation of the " property owned by them."

And again, through Judge DICKINSON, in the Todd County case, the Court says :

" That the purpose of such taxation is to secure to " the State its proper revenue from the taxable property of these corporations."

In St. Paul vs. St. P., M. & M., 39 Minn., 112, this doctrine is reaffirmed. This Court, page 113, said :

" As was said in *County of Ramsey vs. Chicago, " Milwaukee & St. Paul*, these charters did not exempt " the property from taxes, but provided a substituted " method of taxation, based upon the assumption that " the property of the companies will be used for rail- " road purposes, and thereby an income be derived, " the percentage of which, received by the State, will " be equivalent in its results to the taxation of the " property."

In County of Marvin vs. Drake, 40 Minn., 137, involving a discussion of this same subject, the Court used this significant language :

"We fail to see how this involves any violation of " the contract of the state with the company. What

" the state contracted was, not to tax the land in specie,
" while it belonged to the company. The fallacy in its
" argument is the assumption that the payment by the
" company of this per centum tax amounts to a pay-
" ment of the taxes upon all property which the com-
" pany may have owned at any time during the year,
" regardless of its ownership at the particular date in
" the year fixed by law to determine its status for the
" purpose of taxation. The percentage of the gross
" earnings paid by the company is merely the equiva-
" lent of a tax it would have to pay had a tax in specie
" been assessed."

The Court will see that there is an unbroken line of decisions in the Supreme Court of Minnesota, which sustains the proposition that a law which fixes a per centum tax is not an exemption, but a system of commutation. There is no gratuity, but a contract inviolable in its nature, and that prior to the adoption of the State Constitution the territorial Legislature had the unquestioned right to enter into contracts of this nature. This proposition is supported by the uniform decisions of the Supreme Court of the United States, where the doctrine is laid down and reaffimed, that the State may enter into a contract which cannot afterwards be repealed or modified without the consent of both parties to such contract; that while no contract will be presumed and the party relying on the contract must establish its existence, when once established, any law modifying it without the consent of the other party is a law void as impairing the obligation of a contract.

Judge COOLEY says (*Cooley Constitutional Limitations*, 127):

" And it now seems to be settled by the decisions of
" the Supreme Court of the United States that a state
" by contract to that effect based upon a consideration
" may exempt the property of an individual or corpo-
" ration from taxation for any specified period or even
" permanently. And it is also settled by the same de-

" cisions that, where a charter containing an exemption " from taxes or an agreement that the taxes shall be " to a specified amount only is accepted by the corpo- " rations, the exemption is presumed to be upon a suf- " ficient consideration and consequently binding upon " the State."

Some of the decisions of the Supreme Court of the United States upon this point are the following :

State of New Jersey vs. Wilson, 7 Cranch, 164.
Gordon vs. Appeal Tax Court, 3 How., 133.
State Bank of Ohio vs. Knoop, 16 How., 369.
The Jefferson Branch Bank vs. Skelly, 1 Black, 436.
University vs. People, 99 U. S., 309.
Asylum vs. New Orleans, 105 U. S., 362.
Pearsall vs. Great Northern Railway Co., 161 U. S., 662.

It is true that, assuming that such a contract may be made, still it will be construed strictly in favor of the State, and it must clearly appear that the State intended that the special law providing for taxation of the property of the railroad company should not be changed without consent of the railroad company.

Let us apply that rule to the Act of March 3 :

The object and purpose of this act is to provide a scheme of taxation of the property of the railroad. That appears in the title and throughout the whole law. The second section of the act is : " That, upon the filing " by the said company in the office of the secretary of " state of a notification of its acceptance of this act, " the same shall become obligatory upon the state."

What shall become obligatory upon the State ? Why, this act, this method of taxation. Can this language bear the construction that this act shall be obligatory on the State until the State sees fit to change it ? That would be no obligation at all.

The first section of the act provides that, whenever these lands are contracted to be sold, conveyed

or leased, they shall be taxed as other lands. Can that be construed to mean that they may be taxed as other lands before they are contracted to be sold, conveyed or leased, if the Legislature sees fit to so provide? If so, then this act is not obligatory on the State.

The act provides that the railroad company shall, during the first three years, after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year pay into the treasury of the State one per cent. of its gross earnings, and the payment of that sum shall be in full of all taxation and assessment whatever. Can that be construed to mean that the Legislature might the following year provide that the railroad should pay three per cent. or five per cent. instead of one per cent.? If that construction is to be placed upon the act, is it obligatory on the State? The law provides that after thirty miles of the road have been built and in operation ten years, the payment by the railroad company of three per cent. shall be in lieu of all other taxation and assessment whatever. Does that mean that the payment of that percentage shall not be in lieu of all other taxation if the State sees fit to provide for other taxation? Does this act mean for example, that the following Legislature could pass a law putting an additional tax upon the engines and cars of the railroad company?

Nothing can be plainer than that this act means just what it says: The payment of three per cent. shall be in lieu of all other taxation, and that provision and all the provisions of the act are intended to be binding upon the State and not to be changed without the consent of the railroad company.

But when these acts were considered by this Court in the case of *State vs. Luther*, 56 Minn., 156, Judge MITCHELL clearly expressed what the Legislature intended by this act. He says:

> " And it is also perfectly clear to us that under
> " the second act, even if the repealing clause was

" absent, the legislature *intended that the granted*
" *lands should remain exempt from ordinary taxation*
" *as long as they continued to belong exclusively to*
" *the company.*"

We claim there is no room for doubt as to what the Legislature *intended* by this act. It intended that these lands should not be taxed as other lands until they were contracted to be sold, conveyed or leased, and that was the understanding of both parties.

An objection made by the defendant intervenor to construing the act to be a contract is that there is no consideration given by the railroad company and that the same rule applies to a contract with the State as does between individuals, that there is no binding contract where the consideration is all on one side.

There is no doubt about the correctness of the principle. It was applied by the Supreme Court of the United States in

Christ Church vs. Philadelphia Co., 24 How., 300.

In that case the Legislature of Pennsylvania passed an act providing that real property of a certain hospital so long as it belonged to the hospital should be exempt. There was no consideration of any kind given therefor and subsequently other laws were passed providing for the taxation of this property. The Court held that the first act was not irrepealable, that it was not a binding contract because there was no consideration for it. There was no obligation on the part of the hospital.

But is that true of the Act of March 3rd ? That act provides that the railroad company shall pay one per cent. of its gross earnings each year for the first three years after thirty miles of road are completed. two per cent. each year for seven years thereafter and three per cent. each and every year thereafter. It is admitted that the company built its road relying

upon this act. Does not that amount to a consideration? Judge GILFILLAN, in the Parcher case above referred to, expressly says that the agreement to pay a percentage of the gross earnings is a sufficient consideration for such a contract, and that the sufficiency of the consideration is a matter for the Legislature to determine.

But it is claimed that the railroad company was under the obligation to pay a percentage of its gross earnings before the act of March 3rd was passed; that it had agreed to do that when it accepted the Act of February 23. An examination of the two acts shows, however, that, by the terms of the first act, the railroad company was only bound to pay a gross-earnings tax after the whole road was complete and in operation, whereas the second act provides, and the company in accepting it, agreed to begin to pay a gross-earnings tax *as soon as thirty miles of the road was completed and in operation.* Here, then, is a new obligation that the company had not assumed before and one that is sufficient to make a contract.

But it is answered, the railroad company is bound to do its share towards supporting the government and must pay such tax as the Legislature sees fit to impose without any agreement on the part of the State; that the State had the right to say that the payment of the gross-earnings tax should commence when thirty miles of road were completed without making any contract with the company, and therefore the company gave nothing when it agreed to do what the State had the right to say that it should do. But is that true in this case? Did the State have the right on March 8 to say that the railroad company should begin to pay a gross-earning tax as soon as thirty miles of road were completed? Had it not before that time already agreed by the Act of February 23, that the gross earnings tax should commence when the whole line of road from St. Paul to Lake Superior was completed? Was not that a contract binding upon the State which could

not be changed without the consent of the company? There were many other considerations for that contract besides the payment of gross-earnings tax, as we have already seen. The State did not have the right on March 8 to provide that the company should begin to pay its gross-earnings tax when only thirty miles of the road was completed, and the agreement of the company to do so was a valuable consideration. But the main consideration was the building of the road. This law was passed as an inducement to the parties interested in the company to build the road, and relying upon the contract with the State the company proceeded to build the road and other persons relying upon the same contract furnished the company money for that purpose.

Moreover, the Minnesota Supreme Court, in *State vs. Luther, supra*, has expressed the opinion that there were considerations running to the State by the terms of the Act of March 8. The opinion on page 160 says: "The second act covers all the ground covered by the "first, making various changes, some in favor of the "State and others in favor of the company, although "as usual in those days mostly the latter."

The cases upon the subject of taxation are collected in the opinion of this Court in

Pearsall vs. Great Northern Ry., 161 U. S., 646; see pages 662-3.

"This Court has had, perhaps, more frequent occa- "sion to assert the inviolability of corporate charters "in cases respecting the power of taxation than in "any other, and in a long series of decisions has held "that a clause imposing certain taxes in lieu of all "other taxes, or of all taxes to which the company or "stockholders therein would be subject, is impaired by "legislation raising the rate of taxation, or imposing "taxes other than those specified in the charter. Thus "in *State Bank of Ohio vs. Knoop, 16 How., 369*, it "was held that where by a general banking law it was

" provided that a certain percentage of dividends " should be set off for the use of the State, and should " be in lieu of all taxes to which the company or " stockholders therein would otherwise be subjected, " this was a contract fixing permanently the amount of " taxation, and that legislation could not thereafter in- " crease it. In this connection it was said by Mr. " Justice McLean: ' Every valuable privilege given by " ' the charter, and which conduced to an acceptance " ' of it and an organization under it, is a contract " ' which cannot be changed by the legislature where " ' the power to do so is not reserved in the charter. " ' The rate of discount, the duration of the charter, " ' the specific tax agreed to be paid, and other pro- " ' visions essentially connected with the franchise, " ' and necessary to the business of the bank, cannot, " ' without its consent, become a subject for legislative " ' action.' "

It is true the Supreme Court of the United States reiterates the principle that no contract can be presumed and that when a contract is claimed it must be established.

The oftener and more emphatically the Court emphasizes the proposition that a contract of immunity from taxation cannot be implied the more the Court impliedly emphasizes the proposition that when such a contract exists it cannot be impaired.

In *Farrington vs. Tennessee*, 95 U. S., 679, it was held that the charter of a bank granted by the Legislature of Tennessee in 1858, which provided that the bank " shall pay to the State an annual tax of one-half " of one per cent. on each share of the capital stock " subscribed, which shall be in lieu of all other taxes " constituted a contract between the State and the bank, limiting the amount of tax on each share of the stock, and that a subsequent revenue law of the State, imposing an additional tax on the shares in the hands of stockholders, impaired the obligation of that contract and was void.

In *New Jersey vs. Yard*, 95 U. S., 104, the Legislature of New Jersey had passed an act in 1865 with regard to the Morris and Essex Railroad Company to the effect that the tax of one half of one per cent., provided by the original act of incorporation to be paid to the State whenever the net earnings of the company should amount to seven per cent. upon the cost of the road, should be paid at the expiration of one year from the time when the road of the said company should be opened and in use to Phillipsburgh and annually thereafter, "which tax shall be in lieu and "satisfaction of all other taxation or imposition what-"soever by or under the authority of the State or any "law thereof; provided that the section shall not go "into effect or be binding upon the company until it, "by an instrument duly executed under its corporate "seal and filed in the office of the secretary of State, "shall have signified its assent hereto, which assent "shall be signified within sixty days after the passage "of the act, or the act shall be void."

In 1873 an act was passed imposing a more burdensome tax. The Court held that the latter act was a violation of a contract and was unconstitutional and void. The Court says, by Mr. Justice MILLER, at page 115:

"1. The Legislature was not willing to rest this "contract in the usual statutory form alone, depending "for its validity as a contract upon some action of the "corporation under it to bind it to its terms; but they "required of the company a formal written acceptance "within sixty days, or else it became wholly inopera-"tive. The company duly executed this acceptance. "There was, then, the complete formal, written instru-"ment evidencing this contract, signed by the presid-"ing officers of the two houses of the New Jersey "Legislature, and the Governor, for one party, and "the president and secretary and seal of the railroad "company, of the other party. It does seem as if the "legislative intention was to make a contract in the

"same manner and on the same terms of equal "obligation as other contracts are made, and not to "pass a statute which it could repeal or amend the "day after it was signed by the parties. * * * "Can it be believed that it was intended by either "party to this contract that, after it was signed by "both parties, one was bound forever, and the other "only for a day? That it was intended to be a part "of the contract that the State of New Jersey was, at "her option, to be bound or not? That there was im- "plied in it, when it was offered to the acceptance of "the company, the right on the part of the Legislature "to alter or amend it at pleasure? If the State in- "tended to reserve this right, what necessity for ask- "ing the company to accept in such formal manner "the terms of a contract which the State could at any "time make to suit itself?

* * * * * *

"3. The language used by the Legislature is incon- "sistent with the right claimed.

"'Which tax (one-half of one per cent.) shall be in "'lieu and satisfaction of all other taxation or imposi- "'tions whatsoever by or under authority of this "'State, or any law thereof.' Is there here to be im- "plied 'except such laws as may hereafter be enacted?' "Such a provision would be to nullify the whole con- "tract. How could the tax be in lieu and satisfaction "of all other taxation, if other taxes might be imposed "next day? Or how can it be said to be in satisfac- "tion of all taxes whatsoever under authority of the "State, if the State could immediately impose another "and more burdensome tax?

"We admit the force of the doctrine that, when it "is asserted that a State has bargained away her right "of taxation in a given case, the contract must be "clear, and cannot be made out by dubious implica- "tions.

"But of the existence of the present contract there "is no doubt. Its meaning and its terms are clear

" enough, and, taken alone, no one denies but that it " is a contract which would be protected by the Con- " stitution of the United States. The implication is " of a right to revoke it, and comes from the other " quarter, and is one which we do not think exists by " fair construction, and which we do not feel at liberty " to import into the contract to defeat its manifest " purpose."

See, also,

Jefferson Branch Bank vs. Skelly, 1 Black, 436, and cases cited.

FIFTH POINT.

The constitutional amendment of November 8th, 1871, being Section 32a of Article 4 of the State Constitution, was an interpretation and a ratification of the contract in Chapter 8 of the Special Laws of 1865, and said amendment does not confer upon the Legislature the right to amend or repeal the Acts of 1865 without the consent of the railroad company.

If any question exists as to the constitutionality of the contracts of 1865, we further submit that they were validated by the constitutional amendment adopted in 1871, which appears as Section 32*a* of Article 4 of the State Constitution, which provides that any law repealing or amending any law providing for the payment of a commuted tax in lieu of other taxes by a railroad company shall, before taking effect, be submitted to the voters.

We urge, further, that this was not only a ratification of the statutes passed subsequent to the adoption

of the State Constitution, and a recognition of their validity, but was a construction placed by the people upon them. If the laws passed before the amendment of 1871 were void, neither the State nor the companies would be bound by them, and the amendment was unnecessary.

State of Minn. *ex rel.* Jas. M. Marr vs. Luther Co. Auditor, 56 Minn., 156.

This was an application for a peremptory writ of mandamus, made by the relator in Aiken County, directing the Auditor of that county to place upon the tax list certain land of the St. Paul and Duluth Railroad Company for the year 1893, and decided absolutely and squarely the questions which are presented in the case at bar. The opinion of the Court is delivered by Judge MITCHELL, and it was decided that Chapter 8 of the Special Laws of 1865 was constitutional, and that a contract between the State and the company, which insures to the railroad company a continuance of the right to have the commuted form of taxation, is provided in the act.

The Court said, on page 161:

"In the light of experience it is probably very unfortunate that the Legislature, in dealing with the various land-grant railway companies, did not impose some reasonable limitation as to the time during which this immunity of the granted lands from ordinary taxation should continue, but if the State made injudicious contracts the mistake is remediless now."

The Court further said, in discussing the question as to whether the lands of the company were included in the commuted form of taxation, on page 160:

"Neither is the question whether there is a grant of immunity from taxation, but whether a commuted system or mode of taxation has been provided. It is common error, in construing statutes like the present, to assume that, because the commuted tax

" is fixed with reference, and is wholly derived from " the gross earnings of the road, therefore the land " is exempt from taxation altogether. The percent- " age of the gross earnings is paid as taxes on both " the railroad and the granted lands, and, although " derived wholly from the former, is a commutation " tax alike on both."

Page 164:

" There is not in the history of the State a single " grant of lands to aid in the building of a railway " where this system of commuted taxation has not been " adopted, and we have not found an instance prior to " the adoption of the constitutional amendment of " 1871 (Const., Art. 4, 32*a*), where a commuted system " of taxation was provided that did not apply to a land " grant as well as to the railroad property. This " amounted to a legislative construction of the consti- " tution, which of itself would be entitled to great " weight.

" In this situation of things the people adopted a " constitutional amendment (Const., Art. 4, Sec. 32*a*) " ordaining that 'any law providing for the repeal or " 'amendment of any law or laws heretofore or here- " 'after enacted which provides that any railroad com- " 'pany now existing in this State, or operating its road " 'therein, or which may be hereafter organized, shall, " 'in lieu of all other taxes and assessments upon their " 'real estate, roads, rolling stock and other personal " 'property, at and during the time and periods therein " 'specified, pay into the treasury of this State a certain " 'percentage therein mentioned of the gross earnings " 'of such railroad companies now existing or hereafter " 'organized shall, before the same shall take effect and " 'be in force, be submitted to a vote of the people of " 'the State, and be adopted and ratified by a majority " 'of the electors voting at the election at which the " 'same shall be submitted to them.'

" *This language must have been selected and this* " *amendment adopted with reference to the existing*

" *legislation and the general legislative policy to which*
" *we have referred, and, read and construed in that*
" *light, it amounts to a clear recognition of the validity*
" *of existing laws providing for this commuted system*
" *of taxation of railroad property and lands and of*
" *legislative power to enact such laws for the future.*
" *If it did not refer to this, there was nothing to which*
" *it could refer. It is, by necessary implication, a*
" *validation of past legislation of that kind, and a grant*
" *of power to enact it in the future.*"

See *County of Stevens vs. St. P., M. & M. R. R. Co., 36 Minn., 472,* as foreshadowing this construction, and as indicating that that was the view then entertained by the Court.

Now, let us see what was to be validated by the amendment.

The only possible constitutional objection to the Legislature entering into a contract with the company for a commuted system of taxation was Sections 1 and 3 of Article 9, and this went, not to the general power to make a contract, but to provide a commuted system of taxation; and, if that was validated, the entire contract was validated not only upon principle, but upon the rule of law that a ratification of a contract made by an agent without authority is a ratification of the whole contract. As was said by the Supreme Court of Wisconsin in the case of

Strasser vs. Conklin, 54 Wis., 102:

" No rule of law is more fully established than the
" rule that, if one, with full knowledge of the facts,
" accepts the avails of an unauthorized treaty made in
" his behalf by another, he thereby ratifies such treaty,
" and is bound by its terms and stipulations as fully
" as he would be had he negotiated himself. Also, a
" ratification of a part of an unauthorized transaction
" of an agent is a confirmation of the whole."

This amendment refers to laws, which, for the sake of the argument, barring authority of the Legislature,

are absolute, complete, full contracts, perpetual and inviolable.

Take the contract under which the St. Paul and Duluth claims in this case. There the consideration is expressed, provision is made for its acceptance, it is declared to be binding upon the State and company, if accepted, and, as a matter of fact, was accepted within the time provided. Now, what portion of that law has been validated by the amendment of 1871?

Clearly the only vice of that legislation, if any, was in providing a commuted system of taxation in view of the limitations claimed to exist by virtue of Sections 1 and 3 of Article 9 of the State Constitution; and if that particular element has been validated, not only under an elementary rule of law would the entire contract be validated, but, the unauthorized portion being validated, the contract would, *ipso facto*, become a valid contract as to its entire provisions.

Now, the amendment of 1871 is, so far as it provides for a submission to the voters, a mere limitation; it could not give the people the power to ratify an act of the Legislature which impaired the obligation of a contract; the limitation "shall, before the same shall "take effect," must be read in the light of the legal rights of the parties to the contract, and applies as a limitation upon the power of the Legislature, by and with the consent of the companies, to modify the terms of the contract, whether the same was entered into before the adoption of the State Constitution, or subsequent thereto.

It is a part of the history of the legislation involving the acts providing for a commuted system of taxation for railroad companies, that such acts had been frequently amended, and, as suggested by the Court in the Luther case, sometimes in the interest of the State, and sometimes in the interest of the company, and the plain and obvious intent of the amendment of 1871 is a recognition of the validity of these contracts, and the placing of a limitation upon the power of the Legis-

lature to further change or modify them with the consent of the companies, except such modification be ratified by the voters.

We sometimes get a clearer view of a proposition by an illustration:

A is engaged in business; B makes a contract with C, ostensibly for and in the name of A for the purchase of commodities, present and future, upon a definite credit upon each purchase. Assume that B had originally no authority to make this contract; A, however, after the contract is brought to his notice, declares to both B and C that B shall make no modification of the contract except upon his (A's) consent. This is a recognition, or rather, an adoption of the contract made by B. B then attempts to change the time of credit for the goods which he has purchased, without the consent of C to such change, and A claims the right to ratify the change, and that his agreement that no contract made by B should be modified except by A's consent, means that A can arbitrarily, by consenting to B's modification, modify a contract despite the protests of the other party.

It would seem as though the statement of the proposition is sufficient to refute it.

Here, the Legislature makes a contract, in form, with the company, which is accepted and has every element of a complete, express contract, including consideration, except that it is claimed the Legislature exceeds its authority. The people, being the principal, declare that the Legislature shall never modify that contract, except upon their consent; this declaration amounts to and is held by the Court to be an adoption and validating of the act of the Legislature; and then it is asserted that after the agent has been clothed retroactively, with authority to make the contract—for that is what adoption means, as well as ratification—the principal can again modify the contract in opposition to the protests of the other party.

It is claimed by defendant in error that there is to

be found in this amendment an intention on the part of the State to reserve the right to change and modify those contracts whenever it sees fit, and that the consent of the railroad companies interested was not essential to making such change, but we feel certain that a critical examination of the amendment in the light of the condition of the legislation upon the subject of taxation of railroads at the time of its adoption will make it clear that the purpose and intent of this amendment was to place a limitation upon the power of the Legislature to consent to any changes in the contracts with the railroad companies for the payment of a gross-earnings tax without ratification by vote of the people, and that there was no intention to claim that the State had the right to, or to reserve to the State the right to, make any changes in those contracts *without the consent of the railroad companies interested.*

Before considering the language of the amendment, let us first review the situation as to railroads in this State and the provisions for taxing the same as they existed in 1871 at the time it was adopted.

In 1870 there was no railroad in operation in Minnesota that had not been built by the aid of a grant of public land. In 1873 there were less than one hundred miles of railroad in operation that had not been assisted by a land grant. In 1871 there was no general law providing for the payment of a gross-earnings tax in lieu of other taxation, and yet every railroad operated was paying such a tax, and none of the lands granted to the various railroad companies were subject to ordinary taxation; but the State and the territory which preceded it had at various times entered into separate contracts with each of the railroad companies providing that the company should pay to the State a certain percentage of its gross earnings, and in almost every, if not every, such law there was a provision that the granted lands of such railroad company should be exempt from ordinary taxation until sold or contracted to be sold by the company.

This method of dealing with taxation of railroad companies was commenced by the territory in 1857 before any railroad had been built in the Territory, now the State of Minnesota. Contracts were then made with four companies providing that they should pay three per cent. of their gross earnings in lieu of all other taxation, and that the public lands granted to these companies should be exempt from ordinary taxation until sold by the companies. The four companies with which such contracts were made were usually termed the land-grant companies, and are as follows: Minnesota and Pacific Railroad Company, Transit Railroad Company, Root River Valley and Southern Minnesota Railroad Company and the Minneapolis and Cedar Valley Railroad Company.

Chap. 1, Laws of Extra Session of 1857.

These contracts with the land grant companies and their successors were re-enacted by the State after it was organized, and in some cases their provisions were changed so as to be more favorable to the railroad companies. These changes were doubtless made at the instance and with the consent of the railroad companies interested (see Chapter 2, Special Laws 1861; Chapter 17, Special Laws 1862, and Chapter 2, Special Laws 1863, as to Minneapolis and Cedar Valley Railway Co.; Chapter 18, Special Laws 1862; Chapter 1, Special Laws 1863; Chapter 1, Special Laws 1864, as to Root River Valley and Southern Minnesota Railroad Company and its successors; Chapter 4, Special Laws 1864; Chapter 6, Special Laws 1865; Chapter 52, Special Laws 1870, as to the Minnesota and Pacific Railroad Company and its successors, and Chapter 10, Special Laws 1865, as to the Winona and St. Peter Railroad Company, successor of the Transit Railroad Company.)

After the organization of the State and prior to 1871 similar contracts had been made with other companies providing for a payment of a gross earnings tax in lieu

of all other taxation and for the exemption of all granted lands from ordinary taxation until sold, or contracted to be sold, by the railroad company; Chapter 12, Special Laws 1866, and Chapter 9 of Special Laws of 1867, making such a contract with the Hastings and Dakota Railroad Company, and Chapters 2 and 8, Special Laws of 1865, being the acts under consideration referring to the taxation of the Lake Superior and Mississippi Railroad Company, and Chapter 65 of Special Laws of 1870, making a similar contract with the Northern Pacific Railroad Company.

It thus appears that the State Legislature had assumed the right to deal with the railroad companies by this method of taxation and by making separate contracts with each company.

In the year 1871 the following companies paid a gross earnings tax in the amounts as follows:

Lake Superior & Mississippi	$2,651 10
St. Paul & Sioux City R. R. Co.	7,356 85
Southern Minnesota R. R. Co.	5,355 45
Milwaukee & St. Paul R. R. Co.	21,019 37
Hastings & Dakota R. R. Co.	73 69
St. Paul & Chicago R. R. Co.	192 10
First Division St. Paul & Pacific R. R. Co.	9,549 30
Winona & St. Peter R. R. Co.	10,256 32
	$56,454 18

This includes all the railroad companies that were operating at that time. Of these companies all except two companies—the Lake Superior and Mississippi Railroad Company and the Hastings and Dakota Railroad Company—had succeeded to the franchises, or a part of the franchises, of some one of the original land-grant railroads and had the right to pay certain percentage of their gross earnings in lieu of all other taxation, and their granted public lands were exempt from ordinary taxation by virtue of the contracts made in 1857 with the Territorial Legislature. That those

contracts could not be changed *without the consent of the railroad companies* was well understood in 1871, for only two years before that time, 1869, the case of *First Division of St. Paul & Pacific R. R. Co. vs. Parcher* had been decided by the Supreme Court of the State.

This was the situation in 1871 when the amendment to the Constitution was adopted, and as that amendment applies to railroad companies generally, it was aimed principally at the successors of those original land grant railroads which had assumed contract rights under the territorial legislation, which, it was well known, could not be changed without the consent of the companies interested.

Now let us look at the language of the amendment and see if there is anything in it that leads to the conclusion that the people tried, at that time, to assume the right to change those contracts *without the consent of the railroad companies.*

It reads as follows: *Art. 4, Sec. 32a.*

"Any law providing for the repeal or amendment of "any law or laws heretofore or hereafter enacted, "which provides that any railroad company now exist- "ing in this state, or operating its road therein, or "which may be hereafter organized, shall, in lieu of "all other taxes and assessments upon their real "estate, roads, rolling stock and other personal prop- "erty, at and during the time and periods therein "specified, pay into the treasury of this state a certain "percentage therein mentioned of the gross earnings "of such railroad companies now existing or hereafter "organized, shall, before the same shall take effect and "be in force, be submitted to a vote of the people of "the state, and be adopted and ratified by a majority "of the electors of the state voting at the election at "which the same shall be submitted to them."

The plain and obvious meaning of this language is that thereafter the Legislature should not have the power to change the contracts with the railroad com-

panies providing for payment of a gross earnings tax without express consent of the people generally. It was intended as a check upon the Legislature to prevent it from changing those contracts to make them more favorable to the railroad companies. There is nothing in the language that indicates that the Legislature could change those laws without the concurrence of the railroad companies interested, and it would have been surprising indeed if any such idea had been contained therein, for it was generally known then and ever since that time it has been, and is now generally, admitted that the State Legislature could not amend or change those laws enacted by the territory providing for payment of gross earnings tax and accepted by the companies *without the consent of the company interested.*

But this amendment was evidently intended to apply to all laws, whether enacted by the Territory or State, in the same manner, and apparently there was at that time no disposition on the part of the State to question the validity of any of them, but, on the other hand, a general desire to prevent any change being made in any of them without the express consent of the people.

There is no reason why the ordinary principles of law applicable to ratification should not apply in this case. It is very much the same as any other principal ratifying the unauthorized contract made by his agent, by treating it as valid. The Legislature is the agent of the people, the constitution is a limitation of the authority granted to the Legislature. It is claimed that the Legislature has exceeded that authority in making the contracts in question with the railroad companies. These contracts are published and are generally known. The people by an amendment to the Constitution say those contracts shall not be changed without the express consent of the people expressed by popular ballot.

If an ordinary principal, after becoming aware that his agent had exceeded his authority in making a contract on behalf of the principal, declared to the agent and the contracting party that such contract should not be changed without his express consent, it would hardly be claimed that thereupon the contract was merely a contract at the will of the principal and could be changed by him at any time without consent of the contracting party. Yet that is the position of the respondent in this case.

Again, the St. Paul and Duluth Railroad Company and its predecessor, the Lake Superior and Mississippi Railroad Company, have been paying a gross-earnings tax for nearly thirty years, and during the same time the State has received said percentage of its gross earnings. The railroad company has assumed that it was paying this tax under the provisions of Chapter 8 of the Special Laws of 1865. This Court has held that it had the right to pay such percentage under that law; that said law was a valid law *(State vs. Luther, supra)*. But this law on its face is a contract that can only be changed by consent of both parties to it.

The respondent below, defendant in error here, claims, as we understand, that while it is true that these companies have paid said gross-earnings tax, that prior to 1871 such payment was illegal, and since that time the payment has been legal by reason of the constitutional amendment of 1871. But the constitutional amendment did not provide for any new scheme of taxation for any railroad. The tax has been paid, not by virtue of the amendment, but by virtue of the law of 1865. The effect of the constitutional amendment was to render that law valid.

The position of the respondent below, defendant in error here, is that this constitutional amendment did not merely ratify and confirm the law, but that it amended and changed the law in some way so as to take away from it its quality of being a contract.

We fail to find anything in the constitutional amendment that can be construed to have any such effect. It certainly does not expressly repeal or change any law, nor is there anything in the amendment that is inconsistent with the law being a contract; but, on the other hand, it must be admitted that the amendment applies equally to many other laws that are conceded to be contracts. The plain purpose of the amendment was to make it more difficult in the future to change such contracts, and by adopting the amendment the people impliedly admitted such laws to be valid.

Whatever may have been the status of the laws under which the granted lands of the St. Paul and Duluth Railroad Company were exempted from ordinary taxation prior to the constitutional amendment of 1871, since the adoption of that amendment they have been binding contracts which the State could not change without consent of the railroad company, and therefore Chapter 168 of the General Laws of 1895 cannot apply to the granted lands of the St. Paul and Duluth Railroad Company.

In appearance this amendment was intended to restrain the Legislature in the exercise of the power of amending or repealing both classes of statutes. All these statutes were contracts upon their face, evidently intended, both by the Legislature which had passed them and the railroad companies which had accepted them, to be valid and obligatory contracts, irrevocably binding except by consent of both parties. It seems to satisfy the requirements of this amendment to suggest that it was intended only to restrain the Legislature, representing the State, one of the parties to any one of these contracts, in exercising any power to change such a contract, and that its language does not touch the vital question, whether or not the Legislature was clothed with power to represent the other party to such a contract and to define its rights thereunder? No claim is made that the amendment directly states that the future existence of power in the

Legislature to act for both parties is made a condition of ratifying these contracts. It is only claimed that it is implied in this amendment that the Legislature shall have such a power, the existence of which is directly opposed to the language of the statutes themselves, which the Supreme Court of Minnesota has held are ratified and confirmed by these statutes. It is obvious that the conferring of power to change the contracts without the consent of the railroad companies is directly contradictory of their ratification, a condition in repugnance to the grant, so to speak, and tending to destroy its effect. Such a provision, under ordinary rules of construction, should not be read into the amendment or considered to exist merely by implication.

But there is another consideration which is fatal to the existence of this implied power in the Legislature to act for both parties to these ratified contracts. The amendment operates alike upon the statutes passed before the adoption of the Constitution and those adopted after that date. The first class are admitted by counsel for defendant in error to be valid contracts which could not be disturbed by the Legislature, and which the people of the State could not affect by conferring either directly or impliedly upon the Legislature by a constitutional amendment the power to amend or repeal. To sustain the position taken, counsel for defendant in error seems to argue that this amendment was only intended to limit the power of the Legislature to represent the State in the first class of contracts, but was intended in the second class of such contracts, not only to effect such a limitation, but also to confer upon the Legislature the right to affect, even to destruction, the rights of the other parties, the railroad companies, to such contracts.

Such a construction is impossible. We must hold either that the amendment intended to give the Legislature power to amend or repeal the first class of statutes, an utterly impossible construction in the face of the admitted validity of the first class of statutes,

or we must accept the conclusion that neither class of statutes was intended to be subject to amendment or repeal without the consent of both parties to the contract.

The provisions of the Constitution of Minnesota with respect to equality and uniformity can be successfully appealed to in favor of the latter construction of the amendment. Such provisions, while they do not control the Legislature in its right to classify property, do impose upon it the necessity that parcels of property of the same class shall be taxed by the rules of equality and uniformity. It is obvious at a glance that the view of the amendment contended for by the defendant in error would give the Legislature the power to violate these rules of equality and uniformity, and Chapter 168 of Laws of 1895, if put into operation, will clearly violate these rules. The railroad companies who hold contracts as to taxation made by the territorial governments will pay upon gross earnings alone, while those who hold what they have supposed to be contracts with the State governments will pay, not only on gross earnings, but a second tax upon the land grant lands upon an *ad valorem* basis. It cannot be supposed that the people of the State of Minnesota intended by the amendment in question to confer upon their Legislature the implied power to flagrantly violate the provisions of the Constitution (Sections 1 and 3, Article IX.) with respect to equality and uniformity of taxation.

SIXTH POINT.

Chapter 168 of the Laws of the State of Minnesota of 1895 impairs the obligation of the contract and is void under the provision of the Federal Constitution.

That the Act of the State of Minnesota passed in 1895 impairs the obligations of the contract and is void under the provisions of the Federal Constitution follows as a necessary corollary from the propositions above laid down. It undertakes to take away the rights granted under the statutes of the State, and it sets at naught and nullifies the deliberate and solemn contract entered into between the State and the railroad companies by which a fixed percentage of earnings was substituted for the ordinary method of taxation and by which the railroads were relieved from any further or other taxation upon their railroad or the lands granted to them in aid of the construction of their roads. The decision, therefore, of the Supreme Court of Minnesota, in this case, was clearly erroneous and should be reversed.

WILLIAM B. HORNBLOWER,
JULIEN T. DAVIES,
EMERSON HADLEY,
Of Counsel for St. Paul and Duluth Railroad Company, on behalf of Plaintiff in Error.

APPENDIX.

Special Laws 1861, Chapter 1, Act March 8th, 1861.

AN ACT,

To amend an Act entitled an Act to incorporate the Nebraska and Lake Superior Railroad Company

Be it enacted by the Legislature of the State of Minnesota.

SECTION 1. That the act of the Territorial Legislature of Minnesota, entitled an Act to incorporate "The Nebraska and Lake Superior Railroad Company," approved May 23rd, 1857, be and the same is hereby amended and continued, so that it shall read as follows: That Lyman Dayton, John McKusick, Henry A. Swift, Richard Chute, Dwight Woodbury, C. T. Stearns, Thomas Clark, Levi Butler, Sidney Luce, E. O. Hamblin, A. F. Hawley and A. G. Chatfield, of the State of Minnesota, Anson Blake, Erastus Corning, Orville Clark, of the State of New York, E. B. Ward and A. H. Hanchett of Michigan, and their associates, successors and assigns be and they are hereby constituted a body corporate and politic, by the name and style of "The Lake Superior and Mississippi Railroad Company," and by that name and style shall be capable in law of taking, purchasing, holding, leasing, selling, mortgaging, and conveying real estate and property, whether real, personal or mixed, so far as may be necessary or convenient for the purposes hereinafter mentioned, and in their corporate name may sue and be sued, plead and be impleaded, contract and be contracted with, and may have a common seal, which they may alter or renew at pleasure, and may have and exercise all powers, rights, privileges and immunities which are or may be necessary or convenient to carry

into effect the purposes and objects of this Act and of the said corporation.

SEC. 2. That said corporation is hereby authorized and empowered to survey, locate, construct, maintain, use and operate, and at pleasure to alter the line thereof, a railroad with one or more tracks or lines of rails, to commence at some convenient point or place within the State of Minnesota, at the west end of Lake Superior, and running thence by the most feasible route within this State to some point on the Mississippi, with the right to extend the same to the Minnesota river; and also with the right to construct a branch from the main line to the navigable waters of the St. Croix, together with all proper stations, depots, turn-outs, engines, cars and other appurtenances and furniture of a railroad; *Provided*, The said Company shall commence the grading and construction of said road at Superior, and continue the construction thereof toward the Mississippi river, and shall first build their said main line to said Mississippi river.

SEC. 3. The capital stock of said corporation shall be five million dollars, and shall be divided into shares of one hundred dollars each, which shall be deemed personal property, and shall be transferable on the books of said corporation, and the directors may increase the capital stock thereto to such amount as may be necessary or convenient to carry into effect all the rights and privileges hereby granted, not exceeding the whole cost of the road and its appurtenances, and the shares of any increase of stock shall be the same and transferable in the same manner as the shares of the original stock.

SEC. 4. The above named persons, or any of them, are hereby authorizied to open books for receiving subscriptions to the capital stock of said company, which books may be opened at such times and places as a majority of said corporators may determine, by giving twenty days' notice in two of the newspapers published in St. Paul, and also in the State paper at the City of

Albany, New York, of the times and places where said books will be opened; said books may be kept open thirty days, or until the sum of one hundred and fifty thousand dollars of the capital stock of said company shall be subscribed. And as soon as said sum of one hundred and fifty thousand dollars shall have been subscribed to the capital stock of said company, and five per cent. of the amount so subscribed paid in to such person or persons as may have been appointed to receive the same by the persons named in the first section of this Act, who are hereby authorized to make such appointment, the above named persons, or a majority of them, may give like notice of a meeting of the stockholders at such time and place as they may deem expedient, to choose directors; and if at such time and place the holders of one-half or more of the said stock shall attend, either by person or by lawful proxy, they shall proceed to choose from the stockholders by ballot, seven directors, at least three of whom shall reside in the State of Minnesota, each share of the capital stock entitling the owner to one vote; and at such election, the persons named in the first section of this Act, or those appointed by them, (which power is hereby conferred upon them), or any three of them, if no more be pesent, shall be inspectors of such election, and shall certify in writing, signed by them, or a majority of them, what persons are elected directors; and such inspectors shall appoint the time and place of holding the first meeting of directors, at which meeting a majority of directors so chosen shall be competent to transact all business of the company; and thereafter all elections of directors shall be made annually, at such time and place, and in such manner as may be determined upon by the board. Said directors shall, at their first meeting, elect one of their number president, and shall appoint a treasurer, secretary, and such engineers and other officers as they may think necessary, and shall fix their compensation for the services to be rendered,

and may require adequate security for the performance of their respective trusts.

SEC. 5. The board of directors may, at such times as they may deem proper, assess upon the stock subscribed, an installment of not less than two and not more than ten per cent., and require payment of such installment within a reasonable time, not less than thirty days from notice thereof, under penalty of forfeiture of the stock on which the assessment was made or otherwise ordered. They may also make all needful rules, regulations and by-laws, touching the business of said company, determine the number of tracks and railways upon said road, and the width thereof, and the description of carriages to be used thereon, regulate the amount of tolls and manner of collecting the same, and fix the penalties for the breach of such rules, regulations and by-laws, direct the mode and condition of transferring the stock of said company on the books thereof, and the penalties provided for by the said by-laws, may be sued for by any person authorized thereby in the name of said company, and be recovered in any action of debt before any court having jurisdiction of the amount.

SEC. 6. The said company may construct the said railroad across any public or private road, highway, stream of water or water-course, if the same be necessary; *Provided*, That the same shall not interfere with navigation; but said company shall return the same to their primitive state, or in a sufficient manner so as not to impair the usefulness of such road, highway, stream of water or water-course, to the owner or to the public.

SEC. 7. The said company shall have the right of way upon and may appropriate to its own use and control, for the purposes of the said road and its appurtenances, land not exceeding two hundred feet in width, throughout its entire length, except in cases where a borrowing pit or waste bank is necessary for the construction thereof; in which cases such additional land

may be appropriated by said company as may be necessary, and said corporation may, by its engineers, agents and contractors, enter upon and take possession of and use all and singular any lands, timber, streams and materials of any and every kind, for the purpose of making the survey and fixing the location of said railroad, and all stations, depots, turnouts and other things necessary, proper or convenient for the same, and the full use and protection thereof, and of all its appendages and appurtenances. All such lands within the limits of the line of said railroad, and which may now belong to this State or hereafter may be acquired thereby or by the State in which said line may be, are hereby granted to the said corporation for such purposes, to be by them held and possessed, so long as the same shall be used for such purposes; *Provided*, That in case any of the lands which have been reserved, or shall hereafter be reserved or granted for the use of schools, shall be included in the limits of said line, the corporation shall pay therefor such sum, not less than one dollar and twenty-five cents per acre, as the Governor of the State shall fix, which sum shall be paid to the Governor, and shall belong to the school fund of this State.

SEC. 8. The said corporation may take and hold for the said purposes or any of them, such additional lands as may be requisite or convenient therefor; but unless such lands shall be purchased of, or voluntarily given by the owners thereof, full and proper compensation therefor shall be made by said corporation to the owner or owners thereof, which compensation shall be ascertained and determined in the manner following:

The said corporation may present to any court in the judicial district in which the lands or real estate proposed to be taken shall be situated, having jurisdiction competent to entertain, adjudicate and determine questions of title to real estate, a petition signed by some authorized agent or attorney thereof, describing with reasonable certainty and accuray by map,

plat, survey, or otherwise, the lands or real estate so proposed or required to be taken; and setting forth the name of each and every owner, incumbrancer, and other persons interested in the same or any part thereof, so far as the same can be ascertained by the legal records affecting the same, and by view of the premises, or other inquiry, touching the occupation thereof, and praying the appointment of three competent disinterested persons as commissioners to ascertain and determine the compensation to be made to said owner or owners respectively, and to all tenants, incumbrancers and others interested, for the taking or injuriously affecting said land or real estate. A copy of such petition, with a notice of the time and place, when and where the same shall be presented to the court, shall be served on each and every person named therein as owner, incumbrancer, tenant, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering such copy of the petition and notice to each of the persons so named therein, if a resident of this State, or in case of the absence of such person, by leaving such copy of petition and notice at his or her usual place of abode, with some person of sufficient age and understanding to comprehend the object thereof, which shall be communicated to such person, with a request to deliver the same to the individual for whom it is thus left, at the earliest opportunity, and if an infant or a person of infirm mind, then by delivering the same to the guardian of such person. In case there shall be any persons named in said petition who are not residents of this State, upon whom service cannot be had in the manner above prescribed, a notice stating briefly the objects of the petition, a description of the lands proposed to be taken, and the time and place of presenting the petition to the court, and directed to such person or persons, shall be published in the newspapers printed

nearest the location of such lands, and in a newspaper published at the seat of government of the State in which the lands shall be situated, once in each week for six weeks successively, previous to the time designated for presenting such petition. The court to whom such petition shall be presented, shall not make any order for the appointment of commissioners to ascertain and determine the compensation to be paid to any owner or person interested, who shall not appear in person or by attorney, except upon proof by affidavit and to the satisfaction of the court, of the service of the petition and notice, in the manner hereinbefore prescribed, but may do so upon the appearance of the party, or upon proof of service in the absence of a party. The court may upon the application of said corporation or of any party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new and further notice to be given to any party whose interests may be affected thereby. When the court shall have satisfactory proof that all parties interested in any parcel of land have been duly served with the petition and notice in the manner herein prescribed, and of the nature and extent of the interests of each and every party in the same, the court may make an order, to be recorded in the minutes thereof, appointing three disinterested competent persons commissioners to ascertain and determine the amount to be paid by the said corporation to each of such persons as compensation for his interest or estate in such parcel or parcels of land and specifying the time and place of the first meeting of such commissioners.

The said corporation shall without delay procure and deliver to each of said commissioners a copy of such order. Before the said commissioners shall enter upon the discharge of their duties, they shall respectively take and subscribe an oath that they shall faithfully and impartially, discharge their duties as commissioners, to ascertain and determine the compensation to be paid

by the said corporation to the respective claimants for lands or interest in lands to be taken for the use of said company. Such oath may be taken before any officer authorized by law to administer oaths. Whenever the place of any commissioner shall become vacant, the court may upon such notice to the parties as he may prescribe, and by like order supply such vacancy by the appointment of another person as such commissioner, who shall be in like manner served with a copy of the order appointing him, and take the oath. The commissioners shall meet at the time and place specified in the said order, and when met, and all present, may proceed with the hearing of the proofs and allegations of the parties and are hereby authorized to administer oaths to witnesses before them.

The commissioners may, as the exigency or convenience of any case shall require, adjourn from time to time and to such place as may in their judgment be most conducive to the purposes of their investigation. No proceedings shall be had by said commissioners unless all of them be present, except to adjourn, but any and every question submitted to them may be decided by a majority, and a report by a majority shall be valid. The said commissioners shall keep minutes in writing of all their proceedings, in which they shall enter the time and place of their meetings and adjournments, the names of parties appearing before them, and whether in person or attorney, the substance of the testimony of witnesses sworn and examined before them, and all disputed questions which shall be submitted to them, and their decisions thereon. In estimating damages or compensations to be paid to any claimants, the said commissioners shall take into consideration the benefits to accrue to the claimant by the construction of the said railroad, and allow such benefits by way of a reduction of the damages which such claimant may sustain thereby, and report only the balances of the damages but no balances shall in

any case be reported in favor of the company. They shall make and sign a report which shall contain a description by metes and bounds, survey, map or plat of each separate parcel or points of land proposed to be taken by the said company for its use, the compensation for which they shall ascertain and determine, and the amount, if anything, to be paid by said company to each person whose interests are to be affected thereby.

They shall as soon as their report shall be made attach thereto their minutes and oath of office, and file the same in the office of the clerk of the court appointing such commissioners, and notify the parties interested in such report that the same is made and filed. In case the said company, or any person interested in such report, shall deem the same unjust in any manner affecting the amount of the compensation to be paid, the company or such party may appeal therefrom at any time within twenty days after the service of notice of filing of such report. The party appealing shall file a notice of such appeal with the clerk of the court, with whom the report shall have been filed, stating the grounds of the appeal, and serve a copy thereof on the opposite party within the time above prescribed for taking an appeal, and by giving a bond in such penalty as the said court shall prescribe, conditioned to prosecute the appeal without delay, to abide the order the court may make on such an appeal, and to pay the costs if he shall fail therein. Upon the filing of the notice and bond for appeal with proof by affidavits of service of such appeal as above prescribed, all further proceedings on the report shall be stayed until the further order of the court and the cause upon such appeal shall be entered, proceeded in and determined in the same manner as cases on appeal from courts of justices of the peace; and in case the appeal shall involve the determination of any question of fact the same shall be tried by a jury unless a jury shall be waived by both parties. The report of the commissioners shall

be final and conclusive, unless appealed from in the manner above prescribed. Whenever the company shall take appeal from any report of the commissioners, such appeal shall not stay the work on the road or other structure on the lands involved in the appeal: *Provided*, The company shall deposit in court the amount awarded by the report appealed from, to abide the order to be made by the court on appeal. An appeal from any report of commissioners by or on the part of any person interested in any parcel of land or real estate, proposed to be taken by the company, shall stay all work on the road or other structure on the premises in question, unless the company shall deposit in court the amount of money claimed by such appellant before the commissioners, to abide the order of the court on said appeal. Whenever any report of commissioners shall have become final, and whenever any appeal from such report or part of report shall have been finally determined, the said corporation shall upon the payment to each party interested, of the sum determined thereby to be due him or her, as a compensation for property taken, or deposit the same in court for his, or her use, become invested and seized of the title of the land or real estate for which such payment or deposit shall have been made, and entitled to full, free and perfect use and occupancy of the same for the purposes aforesaid. The said commissioners shall be entitled to receive two dollars per day for their services, and their compensation and all the fees of officers previous to, and including the filing of the report of the commissioners, shall be paid by the said company.

In case the title acquired to any lands by the said company in the manner hereinbefore mentioned or otherwise, shall prove defective, they are hereby authorized to take the proceedings prescribed in this section to procure the title from the real owner.

SEC. 9. The said corporation shall have power to consolidate its capital stock with the road of any other

company having the same general direction or location, or become merged therein by way of substitution, upon such terms and conditions as the two companies may agree upon by the consent of a majority of the stockholders, and the two companies when consolidated shall be managed and controlled by the board of directors of both companies acting jointly until the first election of directors of said consolidated companies, when the stockholders of said consolidated companies shall choose, at such time and place as they shall agree upon, a board of directors not to exceed eleven in number, who shall have power to change the name of said company, adopt a common seal, sue and be sued, contract and be contracted with, and shall have all the rights and privileges conferred by this Act and by the laws of all the States and Territories through which the said consolidated road shall pass; and the right of way may be taken as provided for in this Act, which said agreement of consolidation shall be signed by the president, and a copy thereof filed in the office of the secretary of the States and Territories through which said road shall pass.

SEC. 10. The said company is hereby authorized to borrow money to be expended in the construction and equipment of their said road and its appendages, and to issue bonds for the payment thereof, in the usual form, and may make and execute in the corporate name of said company all necessary mortgages, writings, notes, bonds, or other papers, for any liability that may be incurred in the construction or equipment of said road.

SEC. 11. The fee simple of all lands along the line of said route, or otherwise, granted by the Congress of the United States, for the purpose of aiding in the construction of said road may be directly granted to said company, and said company is hereby empowered to receive title thereto, and to transfer said lands from time to time, and to convey in fee simple or otherwise, as soon as, and as often as five miles of said road shall

be constructed and completed, and the track thereof shall be put in running order, and the grant shall not become void, nor the company be dissolved by the non-completion of the entire extent of said road, but shall be good and valid to all intents and purposes for the parts or portions of said road completed, and the said company shall continue and survive to that extent. *Provided*, That if any lands should be granted by the Congress of the United States to the State of Minnesota or the aforesaid company, for the construction of the line of road contemplated in this charter, the Legislature shall have the right to make such restrictions as they may deem expedient, concerning the time and terms of sale of such lands.

SEC. 12. This company shall have the power to enter upon and pass over the railroad of any other company, whose railroad connects with that of this company, with their cars and engines, and any other company whose railroad connects with that of this company, shall have like power to enter upon the railroad and pass over the same with their cars and engines, and such reciprocal use of said respective roads, shall be upon such terms and conditions as shall be agreed upon by the officers of said respective companies, and in case the two companies cannot agree upon terms, then either party may apply to the Supreme Court of this State, whose duty it shall be to fix such terms for the respective parties as may be equitable.

SEC. 13. The said company shall carry and transport the mail of the United States upon such terms as may be agreed upon, and all such freight and passengers as may be offered, if required so to do, upon such terms as are usual, in like cases with like railroad companies.

SEC. 14. If any person shall willfully obstruct, or in any way injure any part of said railroad or anything affixed or appurtenant thereto, and necessary or convenient for its use, or any materials for the construction thereof, or any building, fixture, or other structure,

carriage, engine, or car thereof, such person shall be deemed guilty of a misdemeanor, and shall be liable to be indicated and punished therefor, and shall also be liable to pay the company twice the amount of damage occasioned thereby.

SEC. 15. Every conductor, baggage master, or other agent or servant of said company, and who shall be engaged in the ticket office or on the cars on said road, shall wear upon his hat or cap a plain badge, which shall indicate his office or station, and no conductor or collector shall demand or be entitled to receive any fare or toll, or exercise any control or direction in this station, or be authorized or allowed to interfere with any passenger, baggage, or freight, without wearing such badge.

SEC. 16. Every locomotive engine on said road shall be furnished with a good and sufficient alarm bell or whistle, which shall be fully sounded at least eighty rods distant from every highway crossing, while the engine shall be approaching the same, and passing over said road, and for every violation of this section the said company shall forfeit and pay to whomsoever shall prosecute for the same, the sum of fifty dollars.

SEC. 17. This act is hereby declared to be a public act, and may be amended by any subsequent Legislative assembly in any manner not destroying or impairing the vested rights of said corporation.

SEC. 18. If the company shall, within one year, organize and locate the line of their said road, and within two years grade at least twenty continuous miles of the same from Lake Superior, and shall within five years from the passage of this Act construct and complete a first-class railroad from Lake Superior to the Mississippi River, with the necessary engines and cars running thereon for the transportation of passengers and freight, then, and in such case, the said company shall be entitled to have and to own in fee, all the swamp lands for several miles on either side of the line of said road, and its extension to the

Minnesota river, and its branches, as provided in the second section of this Act, as soon and as fast as every twenty consecutive miles thereof shall be locat d and completed. And for that purpose, as soon as said line, its continuation and branch, shall be located, the lands shall be withheld from market, and upon the completion of any twenty consecutive miles of said road, with cars running thereon, the lands within seven miles of either side thereof shall be certified and conveyed to said company by the proper officers of the State; *Provided*, The whole of said road, extension and branch shall be completed in ten years. And the land shall not be subject to taxation so long as the fee thereof remains in the said company; *Provided*, That the said company shall sell and dispose of all said lands within ten years from the time the same shall be certified and duly transferred to said company from the State.

And provided further, That when the said road shall be completed as hereinbefore provided from Lake Superior to the Mississippi river, or the branch or continuation thereof as aforesaid, if it shall be found that any portion of said swamp lands have been sold or otherwise disposed of, within the said seven miles, by the United States, the amount shall be made up of other swamp lands belonging to the State outside of said seven miles. And if it shall be found that within the said seven miles on each side of said line there shall not be an amount of swamp lands belonging to the State, to at least seven full sections per mile, then the said company shall have the right to select from the swamp lands belonging to the State outside of said line and between the Mississippi river, Lake Superior and Rainy Lake, other lands in an amount in all equal to seven full sections for each and every mile of such completed railroad, branch or continuation.

SEC. 19. This Act shall take effect from and after its passage.

Approved March 8, A. D. 1861.

Special Laws 1863, Chapter V. Act March 6, 1863.

AN ACT

To extend the Time for the Grading and Completion of the Lake Superior and Mississippi Railroad.

Be it enacted by the Legislature of the State of Minnesota :

SEC. 1. That the Lake Superior and Mississippi Railroad Company, as organized under the Act entitled "An Act to amend an Act to incorporate the Nebraska and Lake Superior Railroad Company," approved March 8, A. D. 1861, shall be entitled to have the time for the grading, construction and completion of said road and its branches, extended as follows, to wit : If said company shall, within three years from the time of the passage of this act, grade at least twenty miles of their said road from Lake Superior, and within ten years from said last named time, construct and complete a first-class railroad from Lake Superior to the Mississippi river, with the necessary cars and engines running thereon ; then, and in that case, said company shall be entitled to the lands in said act granted for said line and its branches, as provided in section eighteen (18) of said act, as soon and as fast as each and every twenty miles of said road shall be completed, subject to the provisions and conditions of said Act, and with all the rights, property, privileges and franchises in said Act granted.

SEC. 2. This Act shall take effect and be in force from and after its passage.

Approved March 6, 1863.

Chapter 2 Special Laws of Minnesota 1865.

ACT OF FEBRUARY 23.

"An act to execute the trust created by the act of congress, entitled 'An act making a grant of lands to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior,' approved May five, eighteen hundred and sixty-four, and to grant the said lands to the Lake Superior & Mississippi Railroad Company, to aid in the construction of its railroad, and to amend and continue certain acts in relation to said railroad company.

"*Be it enacted by the Legislature of the State of Minnesota:*

"SECTION 1. That all the rights of way, benefits, privileges, lands and property granted to the State of Minnesota, by virtue of the act of congress of the United States, entitled 'An act making a grant of lands to the State of Minnesota, to aid in the construction of the railroad from St. Paul to Lake Superior,' approved May five, A. D. 1864, be and the same are hereby accepted, and the same are hereby granted, vested in and transferred to the Lake Superior & Mississippi Railroad Company, its successors and assigns, to be held, used or sold and disposed of by said railroad company, to aid in the construction of a railroad, as contemplated and provided by said act of congress, and for the equipment and operation of the same, for no other purpose whatever, the same to be held, used and disposed of, upon, and subject to the conditions in said act of congress provided, and upon the conditions in this act contained. That in consideration of lands granted by this act, and of the lands, rights, privileges, and franchises which have heretofore been granted to said railroad company, the said company shall, on or

before the first day of March of each and every year after said railroad is completed and in operation, pay into the treasury of the state; three per cent. on the gross earnings of said railroad, which sum shall be in lieu and in full of all taxation and assessment upon the said railroad, its appurtenances and appendages, and all other property of said company, real, personal and mixed, including the lands hereby and heretofore granted to said company, or so intended to be granted.

"*Provided, however*, that the lands hereby and heretofore granted to said company shall be subject, like lands of individuals, to be taxed as fast as the same are sold or conveyed, or contracted to be sold, or are leased by said company, or the stumpage upon any lands is sold or contracted to be sold by said company; but no mortgage or trust deed executed by said company upon said lands shall, for the purpose of taxation be construed as such sale, conveyance, lease or contract of sale. And for the purpose of ascertaining the gross earnings aforesaid of said railroad, an accurate account of said earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the Treasurer of State on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavit of the treasurer of said company, and for the purpose of ascertaining the truth of such affidavit, and the correctness of such abstract, full power is hereby vested in the governor of this State, or any other person appointed by law to examine the books and the officers and employes of said company, or other persons under oath, and if any person on such examination shall knowingly or willfully swear falsely, every such person shall be subject to the pains and penalties of perjury. And for securing to the state the payment of the aforesaid per centum it is hereby declared that the state shall have a lien upon the railroad of said company, and upon all the other property of said company, real, personal and mixed, and the lien hereby secured

to the state shall take and have precedence of all demands, decrees and judgments against said company.

"*Provided, further*, that said railroad land shall be taxed as other lands in the state, in five years after the said company shall become entitled to said lands.

"SEC. 2. That whenever within the time in said act of congress, and this act provided for the completion of said railroad, said company shall complete ten miles of its said line of road, with the cars running thereon, it shall be entitled to a conveyance, to be executed by the governor of this state, of the swamp lands heretofore granted to said company by the act entitled 'An act to incorporate the Nebraska & Lake Superior Railroad Company', approved March eight, 1861, and the act of March six, 1863, amendatory thereof, appertaining to such ten miles, and so from time to time as each additional ten miles shall be completed as aforesaid, anything in either of said acts to the contrary notwithstanding. And whenever twenty consecutive miles of said road be completed, as provided for in said act of congress or under such other conditions as congress may by law provide, then the governor of this state shall certify the same, and patents shall issue to said company, as assignees of the state, for the quantity of lands to which said state would then be entitled under said act of congress pertaining to such completed portion of said road, and so on from time to time as each additional twenty miles of said road shall be so completed, and whenever said road is fully completed, so as to connect the Mississippi river with the waters of Lake Superior, in the State of Minnesota, all the residue of the lands granted by said several acts shall be conveyed to said company or its assigns.

"Provided, that said company shall not be entitled to any of the lands granted by this act until ten miles of said road are graded and the cars running thereon from the head of Lake Superior, within this state.

"SEC. 3. The said grants of lands to said company are on the conditions that said company shall cause

twenty consecutive miles of said railroad to be completed, with cars running thereon, within three years from the fourth of July, 1865, and the whole of said line from St. Paul to the waters of Lake Superior, within five years from the said fourth of July, 1865, and that in default thereof, all of the said lands named in said act of congress, pertaining to the uncompleted portion of said road shall be forfeited to the state.

" SEC. 4. And the said company shall, by the first of July next after the passage of this act, deposit the sum of twenty thousand dollars or that amount of United States bonds, with the treasurer of state, to be forfeited to the state in case of failure to complete said road within the time as provided in this act, but said deposit may be withdrawn by said company whenever ten miles of its said road are completed and the cars running thereon.

" SEC. 5. The said corporation may make and negotiate, by sale or otherwise, its mortgage or other bonds, and that any mortgage, trust deed, or instrument affecting the franchises of said corporation, or any of its property, may be filed and recorded in the office of the secretary of state of this state and that from the time of filing of any such deed, mortgage or instrument as aforesaid, the record thereof shall be notice to all persons of such lien or interest, and of the contents of such deed or instrument, and it shall not be necessary to record any such conveyance or instrument in the county in which the property affected is situated.

" SEC. 6. That said company shall have the right at any time to select and designate the swamp lands granted to aid in the construction of said road, and from time to time certify the same to the governor, to be held for its benefit and conveyed in accordance with this act, as fast as said company may be entitled to the same, under the conditions named in section two of this act.

" SEC. 7. That said railroad company shall transport all cars, freights and passengers delivered to it for

such purpose by any connecting company, as provided for in the eighth section of said act of congress, and shall have the right and privilege of transporting or having transported, its cars, freights and passengers, as in said section provided, over the road of any such connecting company upon the terms in said act provided; and that section twelve of the act of March 8th, 1861, be and the same is repealed.

"SEC. 8. That said company may construct and maintain telegraph lines upon its road, and charge fees for transmitting messages thereon.

"SEC. 9. That the number of directors of said company may be by resolution of the present board, (increased) to any number, not exceeding eleven. That any citizen of the United States shall be eligible to the office of director, and that the board of directors may meet and transact business in or out of this State.

"SEC. 10. This act shall take effect and be in force from and after its passage.

"Approved February 23, 1865."

"Chapter 8, Special Laws of Minnesota 1865.

ACT OF MARCH 3.

"An act in relation to the taxation of lands granted to the Lake Superior & Mississippi Railroad Company.

"*Be it enacted by the Legislature of the State of Minnesota:*

"SECTION 1. That whenever any lands heretofore or hereafter granted to the Lake Superior & Mississippi Railroad Company to aid in the construction or completion of its road or branches, shall be contracted to be sold, conveyed or leased by said company, the same

shall be placed upon the tax list by the proper officer for taxation as other real estate, for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made, but in enforcing a collection of taxes thereon, the title or interest of the said company or of any trustee or mortgagee thereof shall be in no wise impaired or affected thereby, but the improvements thereon and all the interest of the purchaser or lessee therein, may and shall in case of default of the payment of taxes upon such land, be sold to satisfy the same, and it shall be the duty of the proper officers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes, and that the provisions of the several acts in relation to the taxation of the lands of said company, so far as the mode of taxing such lands conflict with the provisions of this act, shall be and they are repealed.

Provided, that said company shall, during the first three years, after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year, pay into the Treasury of the state, one per cent. on the gross earnings of said railroad, the first payment to be made on the first day of March next after thirty miles of the said railroad shall be completed and in operation, and shall, during the seven years next ensuing, after the expiration of the three years aforesaid, pay into the Treasury of this State, on or before the first day of March of each and every year, two per cent of the gross earnings of said railroad, and shall, from and after the expiration of said seven years, on or before the first day of March, of each and every year, pay into the Treasury of this State three per cent. of the gross earnings of said railroad; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings

aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the Treasurer of this State, on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the governor of this state, or any other person appointed by law to examine under oath the officers and employees of said company, or other persons; and if any person so examined by the Governor or other authorized person, shall knowingly or willingly swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the state the payment of the aforesaid per centum, it is hereby declared that the state shall have a lien upon the railroad of said company, and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the State shall take and have precedence of all demands, decrees and judgments against said company.

"SEC. 2. That upon the filing by said company in the office of the Secretary of State of a notification of its acceptance of this act, the same shall become obligatory upon the State and upon said company; provided, that said notification shall be given within sixty days.

"SEC. 3. This act shall take effect and be in force from and after its passage.

"Approved March 3, 1865."

Chapter 168 of Laws of Minnesota, 1895.

Approved March 18th, 1895.

AN ACT

relating to the taxation of certain lands owned by railroad companies in this state, and repealing laws and parts of laws relating to the taxation of the same, and to provide for the submission of this act to the people of this state for their approval or rejection.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. All lands in this state heretofore or hereafter granted by the state of Minnesota or the United States, or the territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used or occupied for right of way, gravel pits, sidetracks, depots and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies.

Provided that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as now provided by law. And that nothing in this act contained shall be construed to repeal said laws except in so far as the same relate to the tax upon said lands.

SEC. 2. Such portion or portions of any act or acts, general or special, of the state or territory of Minnesota heretofore enacted, which provides or attempts to provide for any exemption of lands hereby declared taxable, from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

SEC. 3. If this act shall be held to be void so far as it applies to the lands of any particular railroad com-

pany in this state, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated.

SEC. 4. This act shall be submitted to the people of this state for their approval or rejection at the next general election for the year eighteen hundred and ninety-six (1896).

The secretary of state shall cause to be printed upon the form of ballots used in voting for state officers at the next general election, in manner conformable with the requirements of the general election law the words:

For taxation of railroad lands---------- Yes.
No.

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and each electing voter at such election shall designate his vote by a cross mark made opposite one or the other of the said words "Yes" and "No", and the said election shall in all respects conform so far as may be to the requirements of the general election law, and the returns of said election shall be made, canvassed and certified and the result thereof declared in the manner provided by law for returning, certifying and canvassing votes cast for state officers.

SEC. 5. This act shall take effect and be in force on and after its passage.

Approved March 19th, 1895.

Chap. LXXIX.

AN ACT

making a Grant of Lands to the State of Minnesota, to aid in the construction of the Railroad from Saint Paul to Lake Superior.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That there be, and there is hereby, granted to the state of Minnesota for the purpose of aiding in the construction of a railroad in said state from the city of Saint Paul to the head of Lake Superior, every alternate section of public land of the United States, not mineral, designated by odd numbers, to the amount of five alternate sections per mile on each side of the said railroad on the line thereof, within the state of Minnesota; but in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, appropriated, reserved, or otherwise disposed of any sections, or any part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, then it shall be the duty of the Secretary of the Interior to select from the lands of the United States nearest to the lines of sections above specified, in alternate sections or parts thereof, so much public land of the United States, not mineral, as shall be equal in amount to such lands as the United States have sold or otherwise appropriated, or to which the rights of preemption or homestead settlement may have attached, as aforesaid; which lands thus selected in lieu of those sold, reserved, or otherwise appropriated or disposed of, or to which the rights of preemption or homestead settlement may have attached, as aforesaid, together with the sections and parts of sections designated as

aforesaid, and appropriated as aforesaid, shall be held and disposed of by the said state for the use and purpose aforesaid: *Provided*, That the land to be so selected shall in no case be located farther than twenty miles from the lines of said road: *and provided, further*, That the lands hereby granted for and on account of said road shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: *provided, also*, That no part of the land granted by this act shall be applied to aid in the construction of any railroad, or part thereof, for the construction of which any previous grant of land may have been made by congress: *And provided, further*, That any and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States, from the operations of this act, except so far as it may be found necessary to locate the route of the said road through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States: *provided, further*, That the minimum price of the even sections and parts of sections of the public lands of the United States, within the limits of ten miles on each side of the line of said road, shall be two dollars and fifty cents per acre.

SEC. 2. *And be it further enacted*, That whenever said state shall cause to be completed twenty consecutive miles of any portion of said railroad, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn outs, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to said state, on each side

of the road, as far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: *provided, however*, That no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement, certified by the governor of the state of Minnesota, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end.

SEC. 3. *And be it further enacted*, That when the said road shall be definitely located, and a plat thereof filed with the Secretary of the Interior, the lands hereby granted shall not thereafter be subject to settlement, pre-emption, or private entry adverse to this grant.

SEC. 4. *And be it further enacted*, That the said state, in addition to the grant heretofore mentioned, is hereby authorized to locate the said road over any public lands of the United States, not otherwise appropriated, reserved, or disposed of, and that the right of way over said lands of the United States for the purpose aforesaid is hereby granted to said state to the width of one hundred feet on each side of said road as located.

SEC. 5. *And be it further enacted*, That the said lands hereby granted when patented to said state, shall be subject to the disposal of said state for the purposes aforesaid, and for no other; and the said railroad shall be and remain a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States.

SEC. 6. *And be it further enacted*, That if said road is not completed within eight years from the time of the passage of this act, as provided herein, no further patents shall be issued for said lands, and no further sale shall be made, and the lands unsold shall revert to the United States.

SEC. 7. *And be it further enacted*, That the United States mail shall be transported over said road, under the direction of the Post-Office Department, at such price as congress may by law direct: Provided, That until such price is fixed by law the Postmaster-General shall have the power to determine the same.

SEC. 8. *And be it further enacted*, That any railroad which may hereafter be constructed from any point on the Bay of Superior, in the state of Wisconsin, shall be permitted to connect with the said railroad, for the construction of which the said lands are hereby granted, at any point which may be selected by the president and directors of said railroad company so permitted to connect their said road, and the said railroad company so permitted to connect shall have the right and privilege to transport, or have transported, over the track of said railroad, for the construction of which the said lands are hereby granted, all or any of its cars, passengers, or freights, and the said railroad company controlling the said road, for the construction of which the said lands are hereby granted, shall have the same right and privilege to transport or have transported all or any of its cars, freights, or passengers over the track of the said railroad of the company so permitted to connect, and said transportation shall be paid by the railroad company using, to the railroad company according the same, at the usual rates or charges, which may be imposed by the said company upon all other cars, freights, or passengers.

Approved, May 5, 1864.

Chap. CLXXXIII.

AN ACT

relating to Lands granted to the State of Minnesota to aid in Constructing Railroads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That whenever it shall appear that the United States have sold or disposed of any lands granted to the Territory or State of Minnesota for the purpose of aiding in the construction of railroads, after the definite location of the line of road, and before the withdrawal of said lands from sale at the proper local land office, said State may by its agent select in lieu of the lands so sold or disposed of, from any of the lands of the United States subject to sale, being odd numbered sections, within twenty miles of the line of the proper road, a quantity of land equal to that so sold or disposed of; and the lands so selected shall be substituted for those so sold or disposed of by the United States, and may be disposed of by said State in all respects as if said substituted lands had been parcel of the original grant to the State. Provided, however, that nothing herein contained shall be so construed as to diminish the quantity of land granted by act of May fifth, eighteen hundred and sixty-four, to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior.

SEC. 2. And be it further enacted, That the time named in the Act granting lands to the Territory of Minnesota to aid in the construction of a certain railroad, "from Saint Paul and from Saint Anthony, by the way of Minneapolis, to a convenient point of junction west of the Mississippi River, to the southern boundary of the Territory", approved March third, eighteen hundred and fifty-seven, for the construction and completion of said road, is hereby extended for seven years from the passage of this Act.

SEC. 3. And be it further enacted, That all the lands heretofore granted to the Territory and State of Minnesota to aid in the construction of railroads, shall be certified to said State by the Secretary of the Interior, from time to time, whenever any of said roads shall be definitely located, and shall be disposed of by said State in the manner and upon the conditions provided in the particular Act granting the same, as modified by the provisions of this Act: Provided, That when the original quantity granted to aid in the construction of any road has been increased, the quantity authorized to be sold from time to time shall be increased correspondingly: And provided, further, That on the completion of any ten miles of road, the State may sell one-half the quantity of lands which said State is authorized to dispose of on the completion of twenty miles.

SEC. 4. And be it further enacted, That the lands granted by any act of Congress to the State of Minnesota, to aid in the construction of railroads in said State, specifically, lying in place, on any division of ten miles of road, shall not be disposed of until the road shall be completed through and coterminus with the same: Provided, however, That this provision shall not extend to any lands authorized to be taken to make up deficiencies.

SEC. 5. And be it further enacted, That so much of any act as conflicts with the provisions of this Act is hereby repealed.

Approved July 13, 1866.

"Article IX.

SECTIONS 1 AND 3, CONSTITUTION OF THE STATE OF MINNESOTA.

"SEC. 1. All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state: provided, that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, or both, without regard to a cash valuation, and in such manner as the legislature may prescribe: *and provided, further*, that for the purpose of defraying the expenses of laying water-pipes and supplying any city or municipality with water, the legislature may, by general or special law, authorize any such city or municipality, having a population of five thousand or more, to levy an annual tax or assessment upon the lineal foot of all lands fronting on any water-main or water-pipes laid by such city or municipality within corporate limits of said city, for supplying water to the citizens thereof, without regard to the cash value of such property, and to empower such city to collect any such tax assessments, or fines or penalties for failure to pay the same, or any fine or penalty for any violation of the rules of such city or municipality in regard to the use of water, or for any water-rate due for the same."

"SEC. 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money; but public burying-grounds, public school-houses, public hospitals, academies, colleges, universities and all

seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation."

Constitutional Amendment, adopted November 8, 1871, known as Sec. 32a. Article 4, of the Constitution of the State of Minnesota.

Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state, or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same shall take effect and be enforced, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 102.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,
Plaintiff in Error,

AGAINST

STATE OF MINNESOTA on the relation of JAMES N. MARR,
Defendant in Error.

Replying Brief for Plaintiff in Error on Behalf of St. Paul and Duluth Railroad Company.

The briefs already filed on behalf of the plaintiff in error sufficiently meet, we trust, the propositions and authorities found in the brief on behalf of the defendant in error.

A few of the authorities cited by defendant in error may, however, call for some words of consideration.

I.

Under Point II., page 25, of the brief of the defendant in error, the case of State vs. Pioneer Savings & Loan Co., 63 Minn., 80, is cited. Examination of this

case will show that it is a conclusive authority on the proposition that the Act of March 3, 1865, in providing for a system of taxing the gross earnings of the St. Paul and Duluth Railroad, as the representative of its property, was constitutional, and that the provisions of the Constitution of the State of Minnesota relative to equality and uniformity of cash valuation and the taxation of all property, real and personal, except certain specified exemptions, were satisfied by a statute which taxes the representative of property, without providing for assessing the property itself. The case in question involved a statute of the State of Minnesota, providing for the taxation of stock of savings and loan companies, and the exemption of the personal property of such corporations. The Court held that the law was unconstitutional, because it made no provision for the taxation of property of non-residents upon which the corporation had made loans.

The Court says:

> "It is true, as claimed by counsel for defendant, that a law providing for the taxation of property is not unconstitutional, because in its practical operation property which ought to pay taxes escapes the burden. But such is not the case. It is conceded, both by the defendant and State, that Section 34, by necessary implication, exempts from taxation the personal property of the defendant and similar associations. Such being the case, it is unconstitutional, unless the Legislature has provided for the taxation of the representative of the property, the stock."

II.

Under Point IV., at page 30 of the brief of the defendant in error, three cases in this Court are cited, which are claimed to show that this Court has become committed to the doctrine that, "under provisions like those of the Minnesota Constitution, contracts stipulating away the power of taxation cannot be made." We submit that these cases do not commit this Court to any such proposition.

The first case cited is that of *Welch vs. Cook*, 97 U. S., 541, which involved a statute enacted by the Legislative Assembly of the District of Columbia in 1873. That statute provided in substance that all property thereafter employed within the District for manufacturing purposes in excess of five thousand dollars should be exempt from all general taxation for a period of ten years from the date of the act. The Legislative Assembly of the District of Columbia was abolished by Act of Congress in 1874, and it was provided that there should be levied on all real estate in the District, except that belonging to the United States and the District itself, and that used for educational purposes, certain taxes. It was held by this Court, following the case of *Salt Company vs. East Saginaw*, 13 Wall., 373, that the Act of 1873 did not constitute a contract between the District and persons engaged in the manufacturing business in the District.

This Court in the case of *Salt Company vs. East Saginaw*, 13 Wall., 373, in an opinion by Mr. Justice BRADLEY, very clearly points out the distinction between a general bounty law and a special contract with particular individuals or corporations. In that case a law had been passed by the Legislature of Michigan providing that all companies or corporations formed for the purpose of manufacturing salt and all individuals engaged in such manufacture shall be entitled to have all property used for that purpose exempt from

taxation for any purpose and shall be entitled to receive as a bounty the sum of ten cents for every bushel of salt manufactured from water obtained by boring in this State, in excess of five thousand bushels. The Court held this did not constitute a contract; but the Court say:

> "It is unnecessary at this time to discuss the question of power on the part of a State Legislature to make a contract exempting certain property from taxation. Such a power has been frequently asserted and sustained by the decisions of this Court."

The Court, however, held that general encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture, whether in the shape of bounties, drawbacks or other advantage, are always under the legislative control, and may at any time be discontinued; such a law being nothing but a bounty law, and in its nature a general law, regulative of the internal economy of the State, dependent for its continuance upon the dictates of public policy and the voluntary good faith of the Legislature.

The Court say:

> "Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract, but the case before us is not of that kind. * * * The case differs entirely from those laws and charters which have been adjudged to be irrevocable contracts. Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the State, and

corresponding duties and obligations are assumed by the corporation, and, if no right to alter or repeal is reserved, stipulations as to taxation or as to any other matter within the power of the Legislature are binding on both parties."

Counsel for defendant in error in effect concede, on page 31, that neither the case of *Welch vs. Cook*, nor the case of *Salt Company vs. East Saginaw* "is similar to the case at bar." They claim, however, that the case of *Welch vs. Cook* is "instructive," because of the "striking similarity" between the language of the repealing Act of Congress and the language of Section 3 of the Constitution of Minnesota. We confess ourselves unable to perceive the alleged "striking similarity." The Act of Congress referred to was in the ordinary form of a taxing act and explicitly provided for the levy of a tax "on all real estate in said District," except that belonging to the Federal or District Government and that used for educational purposes. There was no room for doubt or discussion that this language operated to require a tax to be levied upon property in the district used for manufacturing purposes. The only question was whether the previous act constituted a contract which should prevail, notwithstanding the general language of this new tax law. The Court held that it did not. The language quoted by counsel for the defendant in error, on page 32, to the effect that the Court will "presume" that Congress knew the state of the law at the time of the passage of the Act of 1874, and that it knew of the existing exceptions to taxation in the District, and that it intended to make the new act stand in place of all others upon the subject, does not seem to us to throw any light upon the controversy in the case at bar. We are quite willing to concede that the framers of the Constitution of Minnesota must be presumed to know the condition of the then existing laws in the Territory of Minnesota, and we are also

quite willing to concede that the Constitution of the State stands as the "supreme and exclusive rule" upon that subject as well as every other subject as to which it operates. We have pointed out at great length and in detail upon our main brief the construction placed upon the Constitution by those who framed it and their immediate successors, a construction expressly or impliedly approved of and acquiesced in for a period of forty years. We shall not repeat the argument upon this branch of the case. Our only object at present is to controvert the proposition announced by counsel for the defendant in error that this Court has laid down any such doctrine as stated in Point IV. of the brief of defendant in error.

The second case cited by counsel for defendant in error as sustaining the proposition contended for, is *Railroad Companies vs. Gaines*, 97 U. S., 697. In that case this Court expressly declined to construe the Constitution of Tennessee, on the ground that the Supreme Court of the State had construed the Constitution and such construction would be followed by this Court. It was held that the Constitution of Tennessee, adopted in 1870, had been authoritatively construed by the Courts of Tennessee in other cases, and those courts "in so doing have established a rule of decision for us." The statute in question was passed in 1875. The Supreme Court of Tennessee in 1877 in another case between other parties held the act to be unconstitutional. This ruling of the Supreme Court of Tennessee was made within a few years after the adoption of the Constitution and within two years after the passage of the act which was held to be unconstitutional and in a case between parties other than those involved in the controversy in this Court. Under these circumstances this Court declined to overrule the construction placed upon the Constitution by the Supreme Court of the State. This is quite a different situation from the case at bar, where the construction of the Constitution is made by the Supreme Court of

Minnesota for the first time in the very case at bar and forty years after the adoption of the Constitution and thirty-three years after the acts of the Legislature had been accepted and acted upon by the St. Paul and Duluth Railroad Company or its predecessors. As already stated, this Court did not itself construe the Constitution of Tennessee in the case of *Railroad Companies against Gaines*, nor express any approval or disapproval of the decision of the Supreme Court of Tennessee, except to the extent of intimating that it was not clearly wrong. The decision is, therefore, not an authority to the effect that contracts stipulating away the power of taxation cannot be made.

The third case cited by counsel for defendant in error at page 30 is *Huntington vs. Worthen*, 120 U. S., 97. This case involved the construction of the Constitution of Arkansas. That Constitution, however, was so plain that there would seem to be no room whatever for construction.

It expressly provides that "all laws exempting property from taxation other than as provided" therein "*shall be void.*" Counsel for defendant in error say:

> "Such words are accumulative and precautionary, and do not, it would seem, add to the legal effect of what precedes."

The fact that the framers of the Constitution of Arkansas in 1874, with the experience before them of all the other States up to that time, should have deemed it necessary to put this language in their Constitution, would indicate that such language was deemed to be something more than merely "accumulative and precautionary," and that it did add something to the effect of the language preceding these words; at any rate, their use left "no room for doubt," while the language of the Constitution of Minnesota certainly does leave "room for doubt." The carrying out to its logical conclusion of such an explicit provision of the Constitution of Arkansas certainly does

not commit this Court to the doctrine that, under the provisions of the Minnesota Constitution, such acts as those under which we claim the right to commuted taxation are invalid.

III.

The proposition announced in Point VIII. of defendant in error's brief proceeds upon a misapprehension of the position we have taken with regard to the taxability of the railroad land grants.

We do not contend that the State is precluded from exercising its taxing power after the railroad has acquired title under the land grants. What we contend for is that while the State held the lands they were non-taxable, and that when granted by the State to the railroad companies they might be granted free from taxation in the same manner as when held by the State, and that this would be a lawful exercise of the right of the State to make donations for public purposes. In other words, our argument on this branch of the case is as follows :

A railroad company is a corporation organized for a public purpose. This has always been recognized by the Courts. Being organized for a public purpose the State has the right to confer upon the corporation the right of eminent domain. It also has the right to make donations of public property in aid of a railroad. It also has the right in making such donations of public property to couple with the donations immunity, entire or partial, from taxation upon such property. The property in question in this suit came from the United States to the State clothed with a trust, and for the purpose of being used to aid in the construction of railroads in the State.

The Legislature in donating the lands and in carrying out the purposes for which the United States had granted the lands to the State could lawfully and properly reserve these lands from taxation while owned by the railroad company in whose aid they were granted.

In this connection, however, we again call the attention of this Court to the fact that we do not claim exemption from taxation, but a commuted form of taxation. The right, however, of the State to grant absolute immunity from taxation as to these lands, we do insist upon for the reasons above stated.

Counsel for defendant in error lay great stress on this branch of the case upon *Tucker vs. Ferguson*, 22 Wall., 528. In that case it was held that the State might tax lands granted by the United States to the State for railroad puposes and granted by the State to a railroad company.

As already stated, we do not dispute this proposition; all that we claim is that as the State held the lands in trust for a particular purpose it might, in granting them for that purpose, rightfully and properly grant them free from taxation as an additional element of the granting.

It appeared in the *Tucker* case that the State in the act accepting the grant in 1857, agreed *sua sponte* to forbear to tax for seven years. The legality of this agreement was not disputed, but was, in effect, conceded, and this Court say:

> "There is no complaint that this stipulation has "been violated" (p. 573).

Section 20 of the act provided for an annual tax of one per cent. upon the cost of the road and its equipment and appurtenances in lieu of all other taxes. It was held by this Court that this did not apply to the land grants, as they were covered by the previous section of the act which was by its terms limited to seven yeers (p. 573).

By an act passed in 1871 the lands were exempted from local taxation for three years. This was held not to be a contract, there being no consideration; the company being required to do nothing and having done nothing in return for the exemption—the grant having been made and accepted fourteen years before. It was further held that the question of the constitutional power of the Legislature to levy taxes other than specific taxes did not arise in that case (p. 575).

We fail, therefore, to see that this decision either "fully and completely" disposes of the question involved in this case, or that it in any way impairs the force of the propositions for which we are contending in this court.

As to the so-called "swamp lands" it is quite true that this Court has held, in *United States vs. Louisiana*, 127 U. S., 182, and other cases, that the power of the State to dispose of such lands rests wholly in the discretion of the State, and that the appropriation of the proceeds of the sale of the lands rests in the good faith of the State, and that neither a contract nor a trust "*following the lands*" was created. These holdings, however, do not impair the proposition that these lands were granted to the State for public purposes, and that the proceeds are to be used for public purposes; nor do they in any way impair, as applying to the "swamp lands," the force of the argument which we have made as to the lands granted by the United States for railroad purposes, to the effect that they are non-taxable in the hands of the State, and that the privilege of immunity from taxation may rightfully be transferred by the State to the beneficiaries to whom the lands are granted by the State.

IV.

We do not, of course, controvert the proposition so frequently reiterated in the brief of counsel for defendant in error to the effect that the presumption is against any grant of immunity from or exemption from taxation, either in whole or in part. We recognize fully the authorities cited to that effect—such, for instance, as *New Orleans City, etc., Company vs. New Orleans*, 143 U. S., 192, cited by counsel for defendant in error at page 59 of their brief.

In the case just referred to there was an absence of any language providing that the tax imposed by the city ordinance and agreed to be paid by the railroad company should be *in lieu* of all other taxes. Hence the Court held that the railroad company remained subject to the imposition of such additional taxes as the City or State might thereafter impose.

In the case at bar, on the other hand, it is expressly provided that the payment by the Lake Superior and Mississippi Railroad Company (to whose rights the St. Paul and Duluth Railroad Company is admitted to have succeeded) of three per cent. of the gross earnings of the railroad annually "shall be and is *in full* of *all* taxation and assessment *whatever*." In view of this language it is idle to discuss the question of presumption. There is no room for presumption one way or the other. The intent of this act is beyond all question. The only room for controversy is as to its validity under the Constitution of Minnesota. No other question properly arises before this Court in this case, and for the reasons so fully set forth in the briefs heretofore filed on behalf of plaintiff in error, we submit that the constitutionality of the legislation on the faith of which this railroad was built, cannot now be successfully attacked.

V.

Counsel for defendant in error incorrectly state the purport of the case of *First Division Co. vs. Parcher*, 14 Minn., 297. Counsel state (at p. 17): "We there find the Court *studiously placing its decision* upon the fact that the rights of the company antedated the Constitution."

So far is this from being the fact that the Court appears to have entertained no doubt of the power of the State Legislature to grant lands to a railroad free from taxation in consideration of an annual tax on earnings. The question was discussed whether the Territorial government, being "a mere creature of Congress, created for temporary purposes only," possessed such a power.

The Court say that the general legislative power conferred by the Organic Act of the Territory was "ample to sustain the grant of exemption from taxation in this case, and we can perceive no reason why such grant may not be a subject of legislation as *rightful* under a Territorial *as under a State government*" (pp. 326, 327).

It is not even hinted at by the Court that the Constitution of the State had restricted the power of the State Legislature to make such a grant. The contrary is assumed by the Court. This assumption is especially significant, as this decision was made in 1869, a little over 10 years after the adoption of the State Constitution, and by Judges who were contemporary with the convention which framed the Constitution.

The policy of the *State* at that time with regard to the encouragement of railroad construction is clearly set forth at pages 330 and 331 (quoted in our main brief and in the brief on behalf of the Northern Pacific Railway Co.).

It was not until after this policy had been crowned with success and the State had become honeycombed by railroads built on the faith of land grants, whose

construction and operation had transformed a wilderness into a great, thriving and prosperous community that the Courts of Minnesota began to suspect the constitutionality of the grants by the State. Certainly the Judges who decided the Pareler case had no such suspicion, or if they had they carefully concealed their suspicion.

VI.

The validity of commuted taxation of railroad companies by a charge of a percentage of gross earnings in lieu of a specific tax upon their property or franchises is practically conceded by counsel for defendant in error.

He is obliged to concede this, for the very statute of 1895 which he undertakes to defend, while providing for taxation of the lands granted to railroads, at the same time provides "that said railroad companies shall *continue to pay taxes into the State treasury upon their gross earnings in the same manner and in the same amount as is now provided by law*, and that nothing in this act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands."

The validity of the gross earnings tax is supported on the theory of ratification by the Constitutional Amendment of 1871, as interpreted by the Supreme Court of Minnesota in the *Luther* case.

The Supreme Court of Minnesota and counsel for defendant in error, however, in the case at bar, while recognizing this ruling in the *Luther* case, take the position that the ratification is subject to the right to repeal with the consent of the voters of the State.

We have discussed this proposition fully in our main brief and shall not repeat here our argument on this branch of the case.

We desire, however, to call the attention of the Court to the circumstance that the Act of 1895 *is not such an act as is contemplated by the amendments of 1871.*

The Act of 1895 does not undertake to repeal or amend the provisions of the statutes taxing gross earnings of railroads. On the contrary, it expressly provides that they shall continue in force, except so far as concerns the tax on lands not used or occupied in the actual management and operation of the railroads.

In other words the Act of 1895 retains all the benefits to the State of the system of commuted taxation while repudiating the obligations of the grants.

We submit that the intent of the constitutional amendment was to put the State to its election either to continue or to discontinue the system of taxing upon gross earnings " in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property." We submit that the State cannot continue the system and at the same time abolish the exemptions in consideration of which this commuted system of taxation was accepted by the railroads, and in view of which the system was ratified by the constitutional amendment.

The State must either tax *all* of the property of the railroads according to its value and abandon the system of taxing by a fixed percentage of gross earnings, or else it must preserve the system " in lieu of all other taxes."

Any other construction of the Constitutional Amendment would be most unjust and would subject railroads to double and discriminating taxation of the most unfair description.

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Office Supreme Court
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JAMES H. McKENNEY,
Clerk.

No. 20.

Brf. of Bunn for P. E. Crearg

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed Oct. 1, 1900.

No. 20.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, on relation of James N. Marr.

BRIEF FOR PLAINTIFF IN ERROR.

C. W. BUNN,
Of Counsel.

SUPREME COURT

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OCTOBER TERM, 1900.

No. 20.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, on relation of James N. Marr.

STATEMENT.

This cause was argued and submitted at the last term (No. 102) and was by order of the Court restored to the docket for reargument.

It is a writ of error from a final judgment of the supreme court of Minnesota, that being the highest court of the state. The opinion of the supreme

court of Minnesota is printed in the Transcript, pp. 58 to 70, and reported in 72 Minn., p. 200.

The question here is, whether a certain act of the legislature of Minnesota, Laws 1895, chap. 168, violates the obligation of certain contracts. Briefly stated said law provides that all lands heretofore or hereafter granted by the state of Minnesota, or the United States, or the territory of Minnesota, to any railroad company shall be assessed and taxed as other lands are taxed (except such as are actually used for railroad purposes); and the law also provides that said railroad company shall continue to pay taxes into the state treasury upon its gross earnings in the same manner and in the same amount as now required by law; all laws providing for the exemption of such lands or for their taxation in any special or different manner are repealed.

The contracts which we assert have been violated, are contained in Special Laws of Minnesota, chap. 8, March 3, 1865, and Special Laws of Minnesota, chap. 65, March 4, 1870. The first of these laws provides in brief that the lands granted by the state to aid in the construction of the Lake Superior and Mississippi Railroad shall be taxed in this manner, to-wit: that the railroad company shall pay into the treasury of the state annually 3 per cent. of the gross earnings of its railroad, and this payment shall be in full of all tax and assessment whatever. The special act of 1870 referred to applies the act of 1865 to the Northern Pacific Railroad Company, which had been incorporated in 1864 by the act of Congress of July 2, and which road had not then

been constructed through the state of Minnesota, and could not be so constructed under the congressional charter without the consent of the state.

The proposition held by the state court was that there was no contract because these laws of 1865 and 1870 were beyond the power of the state legislature to pass, being in conflict with the constitution of the state, adopted in 1858, Article IX, sections 1 and 3. 72 Minn. 220-224. These sections provide in brief that all taxes shall be as nearly equal as may be, and all property on which taxes are levied shall have a cash valuation and be equalized and uniform throughout the state; and that laws shall be passed taxing all moneys, credits and investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money.

The decision of the state court is, as we shall show, not conclusive upon this point. It is for this court to decide whether a law of the state violates the obligation of a contract; and this involves two inquiries, (a) whether there was a contract, (b) whether its obligation is violated.

For the proper understanding and presentation of this question a somewhat more detailed statement of the facts is necessary.

The constitution of the state was adopted in 1858, and Article IX, sections 1 and 3 read as follows:

> "Section 1. All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state."

"Section 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money; but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation."

In 1865 the state was trustee under an act of Congress of certain land grants made by Congress to the state in trust to promote and secure the construction of certain lines of railroad, among others a railroad to extend from St. Paul on the Mississippi river to Lake Superior. The Lake Superior and Mississippi Railroad Company had been incorporated for this work, but had not entered on the construction, and it was at that time uncertain when the proposed road would be built or whether it would be built at all. The state, in order to induce and secure the construction of this road, passed chapter 8 Special Laws of 1865, which reads as follows:

Section 1. That whenever any lands heretofore or hereafter granted to the Lake Superior and Mississippi Railroad Company, to aid in the construction or completion of its road or branches shall be contracted to be sold, conveyed or leased by said company, the same shall be placed upon the tax list by the proper officer for taxation as other real estate for the year

succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made, but in enforcing a collection of the taxes thereon, the title or interest of the said company or of any trustee or mortgagee thereof shall be in no wise impaired or affected thereby, but the improvements thereon, and all the interest of the purchaser or lessee therein may and shall, in case of default of the payment of taxes upon such land, be sold to satisfy the same, and it shall be the duty of the proper officers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes, and that the provisions of the several acts in relation to the taxation of the lands of said company so far as the mode of taxing such lands conflict with the provisions of this act, shall be and they are repealed. Provided, that said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March, in each and every year, pay into the treasury of the state, one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next, after thirty miles of said railroad shall be completed and in operation, and shall, during the seven years next ensuing, after the expiration of the three years aforesaid, pay into the treasury of this state on or before the first day of March of each and every year, two per cent of the gross earnings of said railroad, and shall, from and after the expiration of said seven years, on or before the first day of March, of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad; and the payment of such *per centum* annually, as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the

treasurer of this state, on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the governor of this state, or any other person appointed by law to examine under oath the officers and employees of said company, or other persons; and if any person so examined by the governor or other authorized person shall knowingly or willingly swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the state the payment of the aforesaid *per centum*, it is hereby declared that the state shall have a lien upon the railroad of said company, and upon all the property, estate, and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company.

Sec. 2. That upon the filing by said company in the office of the secretary of state of a notification of its acceptance of this act the same shall become obligatory upon the state and upon said company, provided that said notification shall be given within sixty days.

Sec. 3. This act shall take effect and be in force from and after its passage.

Approved March 3, 1865.

In further explanation of this act it should be noted that eight days before it was passed the legislature passed an act, Ch. 2, Spl. Laws 1865, granting said congressional lands to the Lake Superior & Mississippi Company with terms as to taxation which did not prove acceptable (*State v. Luther*, 56 Minn. 158). The act we quote was passed in or-

der to secure acceptance of the grant and construction of the road by the proposed grantee.

The Lake Superior & Mississippi Company also accepted a state grant of swamp lands, which came under the terms as to taxation of the same act. It duly filed an acceptance of the act as therein required and constructed its railway in reliance thereon. Transcript, p.18. It has always continued to pay into the state treasury 3 per centum per annum of its gross earnings in compliance with the act. Trancript, p. 36. These facts were admitted on the trial as shown in the bill of exceptions. Transcript, pp. 54-55. It will be admitted that the St. Paul & Duluth Company is the successor of the Lake Superior & Mississippi Company and entitled to all the rights as to taxation which the latter company would have. This was decided in *State v. Luther*, 56 Minn. 156.

On July 2, 1864, the Northern Pacific Railroad Company was chartered by act of Congress to build a railroad from Lake Superior to Puget Sound, which would extend through the state of Minnesota. By section 17 of the Congressional Charter the company was authorized to accept "any grant, donation, loan, power, franchise, aid or assistance, which may be granted to or conferred upon said company by the Congress of the United States, or by the legislature of any state, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power, franchise, aid or assistance to its own use for the purpose aforesaid." By section 18 it

was enacted that the company should obtain the consent of the legislature of any state, through which any portion of its road might pass, previous to commencing construction. The company under its charter had a congressional land grant lying partly within the state of Minnesota, extending across the northern part of the state from east to west. This land was public land of the United States at that time and had not been earned or acquired by the Northern Pacific company when the act of 1870 was passed; and could not be earned except with the consent of the state and subject to such conditions as it might impose.

In this condition of things the legislature of Minnesota passed chapter 65 Special Laws of 1870, which reads as follows:

> Section 1. That the lands, franchises, property, stock and capital of the Northern Pacific Railroad Company shall be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and shall be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property and franchises of the Lake Superior and Mississippi Railroad Company, as is provided in and by an act entitled "An act in relation to the taxation of lands granted to the Lake Superior and Mississippi Railroad Company," approved March third, eighteen hundred sixty-five. *Provided, however,* That the gross earnings of said railroad company on which a percentage is to be paid to the state shall include only the earnings of that portion of the Northern Pacific Railroad constructed and operated by said company within the limits of this state.
>
> Sec. 2. That said Northern Pacific Railroad Company shall have the right and author-

ity to acquire and hold lands for right of way, depot grounds, and for all necessary purposes of said company in all respects as provided by the general laws of this state, as set forth in sections numbered consecutively thirteen to twenty-seven, inclusive, of chapter thirty-four, title one, of general statutes now in force. But where said company proceeds to condemn private property in more than one county in the same proceeding, the commissioners to be appointed shall be residents of the county where the property to be taken is situated, or of the county to which such county is attached for judicial purposes. And there is hereby granted to the Northern Pacific Railroad Company, the right of way through and over any lands of this state to the same extent as is granted by act of Congress through and over the public lands to said company.

Sec. 3. That whenever the Northern Pacific Railroad Company shall connect with or cross the route or line of any other railroad within the limits of this state and a portion of the routes or lines of said railroads shall be parallel or coterminous, such portions may by agreement of the companies interested therein, be blended in one track, or a double track and side tracks, and may be owned and used in common for such length of time and upon such terms as may be agreed upon by said companies, and said companies shall thereby be held to have complied with the requirements of their respective charters in that particular, the same as if independent tracks had been built by each.

Sec. 4. This act is hereby declared to be a public act, and shall take effect and be in force from and after its passage. *Provided,* said Northern Pacific Railroad Company shall within ninety days from the approval of the same file with the governor a notice of the acceptance by said company of the terms and conditions of this act.

Approved March 4, 1870.

The Northern Pacific Railroad Company had been authorized to construct its road and exercise its franchises in the state of Minnesota by the act of the Legislature of that state approved March 2, 1865 (Transcript, pp. 19-20). It filed an acceptance of the terms and conditions of the act of March 4, 1870, and thereafter constructed its road through the state of Minnesota in reliance thereon (Transcript, p. 20). The percentage of the gross earnings of said railroad provided to be paid by these laws has been duly paid by the Northern Pacific Company to the treasurer of the state of Minnesota each year (Transcript, p. 20). The bill of exceptions settled on the trial shows that the parties admitted these facts in the record (See Transcript, pp. 54-55).

The answer alleges that a certain parcel of land involved in this proceeding was a part of the said congressional land grant of the Northern Pacific Railroad Company, and certain other parcels were a part of the said Lake Superior & Mississippi grants, and that the said acts of the state of Minnesota approved March 3, 1865, and March 4, 1870, and the acceptances of the same filed as aforesaid constitute contracts between the railroad companies and the state, and asserts that the attempted repeal by the legislative act of 1895 without the consent of the companies violates the obligation of said contracts contrary to the provisions of the constitution of the United States.

The repealing act Ch. 168, Laws of 1895 reads as under.

An act relating to the taxation of certain lands owned by railroad companies in this state, and repealing laws and parts of laws relating to the taxation of the same, and to provide for the submission of this act to the people of this state for their approval or rejection.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. All lands in this state heretofore or hereafter granted by the state of Minnesota or the United States, or the territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used or occupied for right of way, gravel pits, side-tracks, depots and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies. *Provided,* that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as now provided by law. And that nothing in this act contained shall be construed to repeal said laws except in so far as the same relate to the tax upon said lands.

Sec. 2. Such portion or portions of any act or acts, general or special, of the state or territory of Minnesota heretofore enacted, which provides, or attempts to provide, for any exemption of lands hereby declared taxable, from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

Sec. 3. If this act shall be held to be void so far as it applies to the lands of any particular railroad company in this state, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated.

Sec. 4. This act shall be submitted to the people of this state for their approval or rejection at the next general election for the year eighteen hundred and ninety-six (1896).

The Secretary of State shall cause to be printed upon the form of ballots used in voting for state officers at the next general election, in manner conformable with the requirements of the general election law the words:

For taxation of railroad lands.....	Yes.	—
	No.	

and each electing voter at such election shall designate his vote by a cross mark made opposite one or the other of the said words "Yes" and "No," and the said election shall in all respects conform, so far as may be, to the requirements of the general election law, and the returns of said election shall be made, canvassed and certified, and the result thereof declared in the manner provided by law for returning, certifying and canvassing votes cast for state officers.

Sec. 5. This act shall take effect and be in force from and after its passage.

Approved March 19, 1895.

The controversy here before the court arose in this way: James N. Marr, a tax-payer of Aitkin County, Minnesota, represented by the Attorney General of the state, filed a petition in the name of the state for a writ of mandamus against Fred Stearns as County Auditor of Aitkin County, Minnesota, praying for a writ commanding Stearns as County Auditor to place on the tax list of Aitkin County certain parcels of land (Transcript, pp. 4-6); the writ being issued, Fred Stearns as County Auditor answered, setting up that certain

of the lands described in the petition were lands of the St.Paul & Duluth Railroad Company, certain of them lands of the Northern Pacific Railroad Company, and certain of them lands of the Great Northern Railway Company; the answer also pleaded the facts in each case upon which these lands were claimed not to be subject to the taxation attempted to be imposed; the answer is in the Transcript, pp. 10-24; the case was tried before the court, findings made and a bill of exceptions settled; the findings are Transcript, pp. 28-38, the bill of exceptions Transcript, pp. 39-56; a final judgment was awarded in the trial court granting a peremptory writ of mandamus as prayed (Transcript, pp. 38-39); appeal was taken to the supreme court of Minnesota, where the judgment of the trial court was affirmed (Transcript, p. 70); this writ of error brings up the final judgment of the supreme court of Minnesota.

ASSIGNMENTS OF ERROR.

1. The court below erred in holding and ruling that the law of March 3, 1865, did not constitute a contract between the state of Minnesota and the Lake Superior & Mississippi Railroad Company, not subject to repeal or modification without the consent of the company.

2. The court below erred in holding and ruling that the laws of March 3, 1865, and March 4, 1870, did not constitute a contract between the

state of Minnesota and the Northern Pacific Railroad Company, not subject to repeal or modification without the consent of the company.

3. The court below erred in holding and ruling that Chapter 168, Laws of 1895, is not a law violating the obligation of the said contracts and in violation consequently of the Constitution of the United States.

ARGUMENT.

I.

Whether the laws of 1865 and 1870 were valid laws and constitute a contract is a question for this court and the decision of the state court is not binding here.

At first sight it might be thought that the construction placed by the supreme court of a state on the constitution of the state, being ordinarily binding on this court, and the laws of 1865 and 1870 in question having been held by the state court not to make a contract, because they were in violation of the state constitution, that that conclusion is also binding on this court. But while under ordinary circumstances this court will follow the decisions of the state court as to the construction of the laws and constitution of the state, that rule does not apply to a case where the very point in controversy is, that those laws constitute a

contract violated by some subsequent state statute. In such a case this court must either abdicate its jurisdiction or must decide for itself whether there is in the first instance a contract. Whether the obligation of a contract has been violated is a question arising under the constitution of the United States and within the jurisdiction granted to this court by the constitution and acts of Congress. In order to determine whether the obligation of a contract has been violated it is essential first to determine whether there was a contract. The one question necessarily includes the other. And when this court inquires whether a contract has been violated it must first determine for itself whether there was a contract. If, in order to decide whether there was a contract, the court must construe the constitution or laws of a state, the validity, scope and effect of those laws becomes a necessary part of the question to be decided by this court. *Mobile & Ohio Railroad Co. v. Tennessee,* 153 U. S. 486, 492 and cases cited: *Jefferson Branch Bank v. Skelly,* 1 Black 436, 443.

II.

It has been held in this court from the beginning that a state may by contract, based upon a valuable consideration, make a binding contract with an individual or corporation on the subject of taxation. *State of New Jersey v. Wilson,* 7 Cranch., 164; *Gordon v. Appeal Tax Court,* 3 How., 133; *State Bank of Ohio v.*

Knoop, 16 How., 369; *The Jefferson Branch Bank v. Skelly,* 1 Black., 436; *University v. People,* 99 U. S., 309; *Asylum v. New Orleans,* 105 U. S., 362; *Pearsall v. Great Northern Ry. Co.,* 161 U. S., 662; *Mobile & Ohio Railroad Co. v. Tennessee,* 153 U. S., 486.

III.

The acts constitute contracts in form.

That the said acts of 1865 and 1870 constitute contracts *in form* is plain. The act of 1865 was passed before the construction of the Lake Superior and Mississippi railroad had commenced, before an acre of its land grant had been accepted or earned. It was part of the terms on which the company agreed to take the grant and to undertake the construction of the railroad. It provides in section 2 that, upon filing by the company in the office of the secretary of state of an acceptance of the act, the same shall be *obligatory upon the state and upon said company.*

The act of 1870, which applies the last named law to the Northern Pacific Railroad Company and its land grant, is equally clear. It was passed before the Northern Pacific road had been commenced; before an acre of the land grant had been earned. It was passed to induce the construction of the road. In the record it is agreed that the road was constructed in reliance upon it. The

act applies to the Northern Pacific Company and its grant all the provisions of the act of 1865 in favor of the Lake Superior and Mississippi Railroad Company. Section 4 requires that the Northern Pacific Railroad Company shall within ninety days file with the governor "a notice of the acceptance by said company of the terms and conditions of this act." The acceptance was filed.

These acts constitute contracts in form and were intended as contracts by the Legislature and by the company.

In the case of *State on Relation of Marr v. Luther,* 56 Minn. 156, the act of 1865 was considered and it was held to apply until the lands were sold, contracted to be sold, or leased by the Railroad Company, the supreme Court saying (p. 159): "The effect of this by necessary implication was that until sold, contracted to be sold, or leased, the lands were to be entirely exempt from taxation in the ordinary way."

The case now here is readily distinguishable from that line of authorities which holds that a mere gratuitous exemption by general law or special law,not based upon consideration and not amounting to a contract, is subject to repeal by subsequent legislation. Here the consideration of the law was the construction of the road, the acceptance of the grant and the agreement to pay the gross earnings tax, all of which were undertaken by the railroad in reliance upon the law. Many millions of dollars have been expended by the Northern Pacific Railroad Company and by the St. Paul & Duluth

Company, perhaps without any income or return, in reliance upon the proposition of the State that the lands should not be taxed except through a payment of three per centum of the earnings of the roads.

That the acts were intended as and understood to be contracts, both by the Legislature and the companies; that they were based on a full valuable consideration now executed; and that they ought in equity and justice to be sustained (unless there is some insuperable legal objection), is settled by a long line of decisions of the supreme court of Minnesota.

In the case of *First Division St. Paul and Pacific Company v. Parcher,* 14 Minn. (Gil. ed.) p. 224, the question was considered of similar acts passed in territorial times and the court said, on page 249:

> "In support of this ground of demurrer the defendants argue—*First,* that the taxing power is a sovereign power, and hence that it is not competent for a legislature to alienate or abridge it unless authorized so to do by the people. The charter granted in May, 1857, constituted a contract between the territory and the Minnesota & Pacific Railroad Company, one of the terms of which was that the lands granted in aid of the road should be exempt from taxation till sold and conveyed by the company. That the exemption thus conferred is a contract right—a right which a legislature, in the absence of constitutional inhibition, is competent to grant, and inviolable—has been settled in a series of decisions by the

Supreme Court of the United States, so that the matter is not open to discussion. *State of New Jersey v. Wilson*, 7 Cranch. 164; *Gordon v. Appeal Tax Court*, 3 How. 133.

Again the court said, on page 251:

"It is also urged by the defendants that the exemption from taxation was granted to the Minnesota & Pacific Railroad Company without consideration, and that, therefore, it does not come within the principle of the decisions of the federal supreme court before cited, but it is rather to be classed among the *privilegia favorabilia* spoken of in *Rector, etc., of Christ Church v. County of Philadelphia*, 24 How. 300, and may, therefore, be revoked at the pleasure of the sovereign. We are of the opinion that a sufficient consideration is to be found in the agreement of the company to construct the road, and to fulfill the other duties imposed by the charter, and among them to pay 3 per centum of the gross earnings of the road into the treasury of the territory or future state."

In *State v. Winona & St. Peter R. R. Co.*, 21 Minn. 472, 477, the court by Chief Justice Gilfillan, in considering the act of 1857 providing for payment of a gross earnings tax and exemption from other taxes of the lands until sold, said:

"This is a contract between the state and the company and whether it is provident or improvident each must abide by it according to its true intent."

In *City of St. Paul v. St. Paul and Sioux City Railroad Co.*, 23 Minn. 469, 475, referring to the act of 1857, granting lands to the Root River Valley & Southern Minnesota R. R. Co., as amended by the act of 1864, the court says:

"This modification of the original contract

> was prohibited by no provision of the constitution; and the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since, as valid, by both the executive and legislative departments of the state government, but, by an express constitutional amendment adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by a vote of the electors of the state."

In *St. Paul and Chicago Ry. Co. v. McDonald*, 34 Minn. 195, 209, the court, by Justice Mitchell, in regard to a similar contract says:

> "The state should and must in letter and spirit, religiously keep its contract obligations; but the law will not tolerate the use of mere forms to evade its spirit."

In *County of Stevens v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 36 Minn. 467, the court said:

> "For the prior enactment embodied the elements of a contract between the state and the corporation which had been in force and acted upon both by the state and by the company for many years, and its annulment by the act of the state alone was impossible under the federal constitution."

It is not out of place further to call the attention of this court to the history of the taxation of land grants in Minnesota and the consideration for these contracts as explained by the highest court of the state. In the Parcher case on page 253 the court said:

> "In addition to what was there said, it is entirely proper for us to refer to the state of things existing when the policy to be adopted was under consideration by the legislature.

> The state was then almost a wilderness. Its population was small and sparse, its capital limited, its business depressed, its resources undeveloped. There was not a mile of railroad within its borders. An outlet by rail for the products of the state was a matter of prime and pressing necessity. The inducements which we were able to hold out to secure this outlet and the construction of needed lines of railway consisted rather in what the state was to be than in what it was. The country at large had hardly recovered from the financial revulsion of 1856-7. How soon the railroads in this state would prove remunerative to their owners, as well as how soon the lands would sell, were matters of conjecture and experiment. And notwithstanding repeated and continued tenders of all the roads, lands and franchises, together with the privileges and exemptions in regard to taxation, it was not until the summer of 1862 that the first ten miles of railway were put in operation in this state. These facts are not without weight in considering whether the grants of lands, without the exemption from taxation, would probably have induced capital to undertake the construction of the roads, especially when we take into account the proverbially high rates of taxation in newly-settled communities."

Again, in the case of *City of St. Paul v. St. Paul and Sioux City Railway Company*, 23 Minn. 471, the same court said:

> "It is a part of the legislative history of the state that its policy in regard to the taxation of this and the other land-grant railroads, so-called, was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state and every portion thereof so far as possible an ultimate and adequate return for the value of the franchises conferred, including this immunity from taxation. It is also a part of this well-known

history that in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act among the four original land-grant companies in 1857, the then territory (now state) adopted a distinct and special policy of taxation in reference to those companies and the lines of road which they were authorized to build, looking to the early completion of these lines, and the just rights and interests alike of the companies, the state at large, and all localities therein. This policy contemplated as a basis of taxation the annual gross income or earnings of the companies, instead of an *ad valorem* assessment or valuation of their franchises and property; and, instead of a general and local system of taxation, the payment of a fixed per centum of their annual earnings into the state treasury for the benefit of the whole state was provided for in lieu of all taxes whatsoever. This, it was supposed, would prove less vexatious and burdensome to the companies, especially in the infancy of their existence; ultimately more advantageous and productive to the revenues of the state, and clearly more just and equal to all localities therein, as all would share equally in the benefit to accrue from taxes raised and contributed on account of property held under franchises derived from the whole people. Experience is fast demonstrating the wisdom of this policy and realizing the expectations of its founders."

That these acts constitute a contract (provided the acts were valid laws) is not doubtful under the decisions of this court. *Pacific Railroad Co. v. Maguire,* 20 Wall. 36; *Farrington v. Tennessee,* 95 U. S. 679.

Not only did the state secure by these contracts the unmeasurable benefit and advantage of construction of the railroads some years in advance

of the time when under different circumstances they would have been constructed; not only did the state secure accelerated settlement and development of its territory; but it secured a perpetual obligation on the part of the companies to pay annually to the state 3 per cent on their gross earnings. By universal practice and by 40 years of practical construction in Minnesota this is now settled to include 3 per cent on the proportion earned in the state upon interstate commerce. When these laws were passed it was more than doubtful if such an assessment on interstate earnings could be legally levied as a tax. Indeed it is still doubtful. See what this court said in *McHenry v. Alford,* 168 U. S. 651, 670. Railroad companies in Minnesota are bound by these covenants to pay this percentage whether valid as a tax or not; and while the lands are being rapidly sold and in a few years will be completely disposed of to settlers, the 3 per cent gross earnings assessment will continue forever. It may well be that this will prove in the end to be a serious burden to the railway companies and largely exceed what ordinary taxation would amount to.

We can affirm without the possibility of successful contradiction that the repealing act of 1895 is *on its face* an act confiscating property and violating the obligation of a contract; for section 1 provides that *all lands* in this state, heretofore or hereafter granted by the state, or United States, *or the territory* to any railroad company shall be assessed and taxed as other lands are taxed; and that the

companies shall notwithstanding still continue to pay 3 per cent on their gross earnings as at present. It has been thoroughly settled by the supreme court of Minnesota, as we shall hereafter show, that the *territory* of Minnesota had power to make such contracts as are here in question and that they bound the future state; also that the state could *regrant* on the same terms, after forfeiture of a territorial grant; so that *at least* all territorial railroad grants and all state regrants are protected by the federal constitution from the operation of this confiscatory law. The result will be, if the validity of this law is sustained as to grants made originally by the state, to cast a heavy burden on companies holding such grants, like the Northern Pacific and St. Paul and Duluth, and exempt from such added burden all the companies holding territorial grants or state regrants. It is matter of public knowledge and will not be questioned that the large majority of railroad grants in Minnesota are territorial grants, or state regrants.

Section 2 of the law in question expressly attempts to repeal the acts of the *territory* of Minnesota, which attempt to exempt land grants, or provide for their taxation in any other method than that fixed in the act. And section 3 provides that the law shall still operate notwithstanding it may be held void as applied to any particular grant. This section evidences the understanding and intention of the legislature (1) to repeal if it could all the contracts of the state or territory (2) to repeal at least the contracts of the state if the courts

should hold that the territorial contracts were inviolable and so make the railroad tax laws discriminating and unequal; to destroy in short all uniformity.

The court will also learn, by reading the record and opinion in the supreme court of Minnesota in this case, that the act of 1895 was only passed by the vote of the lieutenant governor, an ex-senator who had no right to vote (according to the subsequent decision of the senate) but who was given a right to vote by the decision of the supreme court in this case, overruling the senate.

The court will also note that the passage of the law by the people was obtained by a cunning device. Section 4 of the act provides for its submission to the people (as was necessary under the constitutional amendment of 1871) and fixed the form of ballot, which was to be:

For taxation of railroad lands...	Yes	
	No	

This section proceeds on the theory that railroad lands were not then taxed, which was contrary to the fact and to uniform decisions of the supreme court of Minnesota to the effect that they were taxed. Those who drafted this act well knew that the voters of the state would never vote *against* the taxation of railroad lands, as the ballot on the face of it required them to do if they opposed the passage of the law. The act was therefore not *fairly* passed.

IV.

The constitution of Minnesota, adopted in 1858, sections 1 and 3 of Article IX, have no application to the property in question.

The supreme court of Minnesota does not question that the acts constitute contracts in form and intent, or that the contracts are fair and ought equitably and justly to be performed. What that court holds is, that the acts were beyond the power of the legislature, because of the constitutional requirement of *uniformity* in taxation, and therefore void in law.

Passing for the present any consideration of the proper construction of these constitutional provisions, the fact must be admitted that they have no application to property conveyed by the United States to the state in trust to aid works of internal improvement, nor to lands of the United States. Such property could not be taxed by the state in any event. The state cannot tax the lands of the United States. The constitutional provisions relate to *private* property only and must be read as if this qualification were written in them.

When the laws of 1865 and 1870 in question were passed the lands involved in this suit now belonging to the Northern Pacific Railroad Company were property of the United States, and the lands belonging to the St. Paul and Duluth Railroad Company were,either state swamp

lands, or lands conveyed by the United States in trust to the state of Minnesota to aid the construction of a railroad from the Mississippi river to Lake Superior. At that time the constitutional limitations on legislative power of Article IX had no application to either class of lands. Such lands were set aside for a public use with the privilege of commuted taxation created with respect to them and impressed upon them while they were yet public lands. The history of the transaction as shown in the quotations before made from the opinions of the supreme court of Minnesota is, that when these laws were passed the state was almost a wilderness, its population small and sparse, its capital limited, its business depressed, its resources undeveloped. In 1865 there were very few miles of railroad within its borders. An outlet for the products of the state was a matter of prime and pressing necessity. The state had not succeeded in spite of repeated and continued offers in securing the construction of railroads. It was not until 1862 that the first 10 miles of railway were built in the state. We are authorized to infer, as the supreme court of Minnesota has said, that without the offer of the contract in question capital could not have been induced to undertake the construction of the roads, at least for years to come, and that the state received in the contract a fair and full equivalent for future taxes.

These lands were not subject to taxation so long as they remained public lands. They *could* not be taxed until after they passed out of public owner-

ship. So long as they remained public lands they were not subject to the taxing power of the state nor to the limitations on that power expressed in Article IX of the constitution. These limitations are not more extensive than the taxing power itself which they limit. That power and the limitations apply to private property only. Now, in order to get a private corporation to build a railroad the state found it necessary to make a certain contract; it accepted the construction of the road and perpetual payment of three per cent. of its gross earnings to the state and granted in consideration thereof freedom from any other form of taxation until the lands were sold. Thereby the right, immunity, or privilege to pay taxes by a percentage of railroad earnings was impressed upon the land while it was yet public property; and the private interest only attached subsequent and subject to the commutation contract. The immunity attached to the title before the company accepted or earned the lands. The constitution of the state cannot be held to have intended to prevent the state from making such bargains as to its own public domain, or as to government land within its borders, if it found such contracts reasonable and necessary to secure works of internal improvement. And whether such contracts were reasonable or necessary is a question which was settled by the legislature.

(a) *Our contention is we think sustained by the decisions of the supreme court of Minnesota.*

In the case of *First Division of St. Paul and*

Pacific Railroad v. Parcher, 14 Minn. (Gil. ed.) 224, the facts were these; an act of the territorial legislature organized the Minnesota and Pacific Railroad Company and conferred on that company a land grant with provisions as to taxation similar to those here involved; the state having furnished certain state railroad bonds in aid of the company took a mortgage upon the company's property and franchises to secure it; this mortgage the state foreclosed, and on June 23, 1860, bought in the mortgaged property and franchises; this estate and the franchises, including the franchise as to commuted taxes, the state legislature re-granted to the St. Paul and Pacific Railroad Company in March, 1862 (14 Minn. pp. 233-4). The case directly involved the taxes of 1867 in Wright County. Before this, Congress had, by act of March 3, 1865, (13 Stats. at Large, p. 526), *increased* the grant to the state of Minnesota to aid the construction of the St. Paul and Pacific railroad. This additional grant had been conferred on the St. Paul and Pacific company by section 2, chapter 6, special laws of Minnesota 1865. The suit was brought by the company to restrain the assessment of taxes upon lands, as the opinion says, of which it had become the owner under the act of 1857 before referred to *and under subsequent legislation* (meaning, we think, by the italicised clause the said legislation conferring an additional grant), 14 Minn. 249. The constitutionality of the commutation or exemption claimed was challenged in the Parcher case on the following grounds:

(a) that it formed a corporation by special act in violation of section 2, Article X of the state constitution of 1858 (b) that the taxing power is a sovereign power and it was not competent for a legislature to alienate or abridge it unless authorized to do so by the people (c) it was further contended, that even if the state legislature could grant a privilege of this nature as to taxation, a territorial government, which was a mere creature of congress created for temporary purposes only, had no power of the kind (p. 245-250); (d) other grounds of objection were urged not necessary to state. The court said, p. 250:

> "The power thus conferred (i. e., by the act of congress creating the territory) would appear to be ample to sustain the grant of exemption from taxation in this case, and we can perceive no reason why such grant may not be a subject of legislation *as rightful under a territorial as under a state government.*"

In this case we find eminent counsel making all the points which occurred to them against the validity both of the original grant by the territory and the re-grant in 1862 by the state *and the additional grant by the state in the act of* 1865. The state having acquired the territorial grant by foreclosure, the re-grant would certainly seem to have been subject to the provisions of the constitution, if the 1865 and 1870 grants here in question were. But counsel did not suggest to the court, that those provisions of the state constitution respecting uniformity of taxation were any objection to the power of the state to make the con-

tract. The validity of the commutation as to the additional congressional grant of 1865 seems to have been distinctly involved in the Parcher case and was certainly as obnoxious to those provisions of the constitution requiring uniformity of taxation, as the state grants we are now considering. The court sustained the validity of the legislation and must be regarded as having necessarily decided that the re-grant by the state legislature of the commutation tax privilege, together with the land which then belonged to the state, was not obnoxious to these sections of the constitution; and also the court must have decided that the additional state grant of 1865 with commuted taxation attached was not obnoxious to the constitution.

That this is the true construction of the decision in the Parcher case is shown by subsequent decisions of the supreme court of Minnesota. In *State v. Winona & St. Peter Railroad Company,* 21 Minn. 315, a case decided in 1875 involving taxes of 1873, land had been granted to the Transit Railroad Company by acts of the territorial legislature. These grants were on terms as to taxation similar to those here involved. On March 10, 1862, by chapter 19, special laws of Minnesota for that year, these grants and all the rights, benefits, privileges and franchises of the Transit company, having become forfeited to the state, were regranted by the state legislature to individuals, who became the Winona & St. Peter Railroad Company. There was also involved in this case an additional congressional grant made March 3, 1865, 13 Statutes

at Large, 526, granted by the state March 5, 1865; See opinion of court 21 Minn. 315. In the case cited the validity of this legislation was expressly challenged, as being unconstitutional by reason of the constitutional requirement that "Laws shall be passed taxing * * * all real and personal property at its true value in money," and it was said that this constitutional provision prohibited and rendered void any law passed after the adoption of the constitution creating an immunity or privilege with respect to taxation. The court said this constitutional provision did not appear to have been considered in the Parcher case, but distinctly sustained, as against this constitutional requirement, not only the validity of a re-grant by the state legislature of a territorial immunity or privilege, which had been forfeited to and acquired by the state, and at the time of the re-grant held by the state as its property, but also sustained the validity of the additional congressional and state grant, holding both questions to have been settled by the Parcher case. This the court decided without reference to the constitutional amendment of 1871, which is not mentioned in the case.

In *State v. Trustees of Southern Minnesota Railroad Company,* 21 Minn. 344, a forfeited territorial grant was re-granted by the state, chapter 1, special laws of 1864, to the Southern Minnesota Railroad Company. And by section 5 of this act it was enacted that the lands "shall be and are hereby exempted from all assessments and from all

taxation whatsoever, until the same shall have been sold and conveyed by the said company." This was on consideration of a payment into the state treasury of a percentage of gross earnings annually. The opinion of the court does not rest the case on the validity, or invalidity, of the territorial grant, but refers *only* to the said act of the state legislature. The court decides in favor of the immunity from taxation, following the Parcher case. This case also involved the validity of an additional congressional and state grant with the same privilege of commuted taxation, viz: the congressional grant provided in the first clause of the act of July 4, 1866 (14 U. S. Stats. at Large, p. 87).

See also *Minnesota Central Railway Company v. Melvin,* 21 Minn. 339.

It will be noted that the Parcher case was decided and the taxes involved therein were levied before the passage of the constitutional amendment of 1871, and neither that case nor the cases thus far cited refer to that amendment as validating the legislation, but distinctly hold that the legislation was valid independent of the amendment. It will thus be seen that the supreme court of Minnesota, in passing upon *state grants* similar to those here involved, without referring to the constitutional amendment of 1871, has distinctly and several times said that the validity of this legislation was *settled by the Parcher case.*

In *County of Stevens v. St. Paul, Minneapolis & Manitoba Ry. Co.,* 36 Minn. 467, 472, the court considered an additional congressional grant made

March 3, 1865, to aid in the construction of the St. Paul & Pacific Company's lines and the state grant of the same by act March 2, 1865, also the act of March 4, 1865, relating to taxation of these lands. The case involved therefore the questions decided in the Parcher case and in *State v. Winona & St. Peter Company,* of the right of the state legislature to alter and amend a territorial exemption, and involved more prominently perhaps than any previous case the right of the *state* legislature to create an exemption as to lands granted by it. The opinion says (p. 472):

> *"The point that sections* 1 *and* 3 *of article IX of the constitution forbid this legislation was long ago settled in the Parcher case, above cited, and in the cases of State v. Winona & St. Peter R. Co., supra, and City of St. Paul v. St. Paul & Sioux City R. Co., supra*; it being held that those sections of the constitution did not prevent the legislature from modifying the terms of a provision for the payment of a percentage of gross earnings in lieu of other taxation, in a case where that method of taxation had been established prior to the adoption of the constitution, and, in the latter case cited, that by the constitutional amendment of 1871 (section 32, article 4) such legislation had been confirmed."

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Pfaender,* 23 Minn. 217, it appeared that by special laws of 1865, chapter 6, section 18 (passed by the state legislature), the terms of the territorial contract involved in the Parcher case were modified, so that 1 per cent on gross earnings was to be paid for a term of years, 2 per cent for certain succeeding years, and 3 per cent thereafter. The

court without hesitation sustained the validity of this amendment. If the state legislature could amend (with the consent of the company) the terms of an exemption or commutation granted by the territorial legislature, this involved necessarily the power of the state legislature to create a similar commutation or privilege.

In *City of St. Paul v. St. Paul & Sioux City Railroad Co.*, 23 Minn. 469, 475, the court distinctly sustains, as against the sections of the constitution now under consideration, the validity of a legislative alteration in 1864 of a commutation privilege with respect to taxes granted by the territorial legislature, saying:

> "And the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since as valid by both the executive and legislative departments of the state government, but, by an express constitutional amendment, adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by the vote of the electors of the state."

In *County of Nobles v. Sioux City & St. Paul Railroad*, 26 Minn. 294, the validity of an act of 1869, chapter 50, was sustained, which authorized a transfer from one corporation to another of a tax commutation right created by the territorial legislature. It is difficult to see how, if the state legislature could authorize a transfer and assignment of such a right to a new corporation, it could be held at the same time to have no power to *create* such right.

In *State v. Northern Pacific Railroad Co.*, 32 Minn. 294, the court interprets and construes chapter 65, special laws of 1870, and the Lake Superior and Mississippi act of March 3, 1865 (being the laws here relied upon). The court discusses the force and effect of these laws at considerable length, without a suggestion that there is, or ever was, any question about their validity.

In *St. Paul & Chicago Railway Co. v. McDonald*, 34 Minn. 195, the court considered a grant of swamp lands made by the state legislature, special laws 1865, chapter 9, which law provided for a commuted scheme of taxation similar to that here under consideration. The court did not suggest that this act was invalid, but held that the lands were not subject to it because they had been *sold by the company.*

These decisions of the supreme court of Minnesota therefore establish the following propositions: (a) that the state could validly re-grant lands, subject to commuted taxation, which had been originally granted by the territory and forfeited to, or acquired under foreclosure by, the state (b) that the state legislature could amend and alter the time and conditions of such a previous territorial grant with the consent of the grantee (c) that the state legislature could authorize the transfer thereof from one grantee to another (d) that there was nothing in the state constitution, which prohibited the state legislature from making new and additional grants on similar terms and conditions.

As before stated, the Parcher case was decided in 1869 and the act in question applicable to the Northern Pacific was passed in 1870. The St. Paul and Duluth railroad was completed about this time. The Northern Pacific railroad was commenced and completed through the state of Minnesota shortly after. It is perfectly safe for us to assert, that for over 20 years thereafter the Parcher case and the decisions following it were regarded by the bench and bar of Minnesota, as having settled the validity of this class of legislation, whether passed by the territorial legislature or the state legislature. Indeed most of the doubts suggested were with respect to the territorial grants.

It is a rule well founded in justice and authority, that the law as settled when a contract is made must control as to the validity and effect of the contract and that this court will apply that law, ignoring a later decision of the state court which would have the effect to violate the contract. *Havemeyer v. Iowa County,* 3 Wall. 294; *Gelpcke v. City of Dubuque,* 1 Wall. 175; *Chicago v. Sheldon,* 9 Wall. 50; *Olcott v. Supervisors,* 16 Wall. 678; *Louisiana v. Pillsbury,* 105 U. S. 278, 294. It will be noted that in the case at bar the state court gave effect to a subsequent *statute* of the state repealing the law constituting the alleged contract and the case is not therefore controlled by *Bacon v. Texas,* 163 U. S. 207, and decisions there cited.

(b) *Our contention is sustained by the decisions of other courts.* In *Illinois Central Railroad Co. v. The County of McLean,* 17 Ill. 291, public

lands had been granted to the Illinois Central Railroad Company under a contract that they should be taxed by the railroad company paying a percentage of its gross earnings into the state treasury, and taxed in no other way. The validity of this contract was challenged upon provisions of the Illinois constitution similar to those in question contained in the Minnesota constitution. But the court said (p. 296):

> "The case before us is not an exemption or immunity from the payment of taxes. Nor do I hold to a power to discriminate and exempt the owners of the same kinds of property provided to be taxed, or a change of the rule of valuation and assessment. But the exemption of the donated lands may be regarded as an exemption of the *public property until its sale, or the performance of the conditions which will release the lien of the state.*"

In the act of 1865 in question is contained a provision that the state shall have a lien upon the railroad and all the property of the company to secure to the state the payment of three per cent. annually upon gross earnings, and that such lien shall take precedence of all demands, decrees and judgments against the company. A similar provision was in the grant to the Illinois Central Railroad Company considered in the County of McLean case. In a separate opinion in that case by Skinner, Judge, p. 298, that Judge concurred in the majority opinion on the ground that the land was public property not subject to taxation; and the retention of a lien on it by the state removed it entirely

from the provisions of the constitution providing for uniformity of taxation.

In the case of *People v. Auditor General,* 7 Mich. 84, the court considered a case where land had been granted to the state by the national government for the construction of a canal. The grant was accepted by the state and a contract was entered into with the canal company stipulating for the remission of taxes on the granted lands for the period of five years. This was challenged as being contrary to the rule of uniformity of taxation provided in the constitution of Michigan. But the court said (pp. 89-90):

> "It is evident from a consideration of these acts that the land was never a part of the public domain of Michigan, either by grant from Congress, or by sale to a purchaser, before the passage of the act in question, so that the right of taxation had accrued to the state. It was granted to the state for the specific purpose of being applied, either by sale or appropriation, to the purposes of the construction of the canal. As such, it assumed the character of a fund, to be expended under the direction of the state; and so the legislature evidently regarded it, and that the state held such land only as trustee for the accomplishment of that purpose."
>
> "Instead of selling the lands, and appropriating the avails towards the construction of the canal, the legislature found it desirable, if not necessary, to appropriate the lands themselves. From the course of legislation we may presume that this appropriation of the lands, was found to be insufficient of itself to induce any one to undertake the work, and that in order to render it sufficient, the state authorized the contract for the remission of the taxes

thereon. This authority was given, and the contract executed, while the lands were in a condition in which they could not be taxed, and until such right of taxation had accrued to the state, it was not within the scope of either its constitutional or legislative provisions. The state had power to contract with the company to convey the lands after five years, and thus relieve them during that period from taxes, and if it might do this, it is difficult to find a reason why it might not so convey them as to secure the same exemption from taxation. In making this contract the state acted as the trustee of the general government; in the law authorizing the contract, it was dealing with the subject of the trust, over which no right of taxation then existed."

In *Portland v. Water Co.*, 67 Maine, 135, it was held within the constitutional authority of the legislature, to empower the city council of Portland to exempt from taxation for a term of years property of the Portland Water Company, in consideration of an undertaking and agreement by the company to furnish, free of cost to the city, a supply of water for its public and municipal purposes.

The constitution provided

> "All taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof."

The court say (at p. 137):

> "We are not satisfied that the legislature cannot, by charter or contract, in any case and under any circumstances, release one corporation from taxation, merely because it does not include in its exclusion from taxation all similar corporations in the state.

> "The property of the defendants has been appropriated and devoted to a public use and may be exempted from taxation for the same reason that town houses and school houses and railroad tracks are exempted. It was only because their works were public works that they would be permitted to take land for their purposes under the exercise of the right of eminent domain. True, the title of the property is vested in the corporation. But the corporation holds it, to some extent, as a trustee for the public. It must be used for the public, and in a great measure its use may be controlled by the public."

In *State of Arkansas v. County Court of Crittenden County*, 19 Ark. 360, it was held that lands, granted by congress to the state for the purpose of enabling the state to construct levees and drains to reclaim swamp and overflowed lands and sold by the state with an exemption from taxation for ten years, or until said lands are reclaimed, were protected by the contract of the state from taxation during the period named, and an act of the state legislature taxing them was repugnant to the United States constitution and void.

It was further held that the exemption was not repugnant to the constitution of the state, to the effect that "all property subject to taxation shall be taxed according to its value," and that "no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

The character of these lands and how they differ from ordinary private property was well ex-

plained in the opinion of Mr. Justice Peckham, in *McHenry v. Alford*, 168 U. S. 651, 665-668.

This question may be illustrated by reference to two classes of lands; (a) lands like those of the St. Paul and Duluth, granted by congress to the state in trust, (b) lands of the United States like those granted to the Northern Pacific.

First, as to lands granted by congress to the state in trust. Such lands need not have been conveyed to a railway company at all. The trust defined in the act of congress was "to aid the construction" of a certain railway. The state was left to pass such law, as might be found advisable, fixing the manner of the execution of the trust. As said by the supreme court of Michigan in the case above cited, the state might have contracted to convey the lands to the company after the expiration of a term of years, during which term they would not have been taxable; and indeed the state might have enacted that it would retain itself the title to the lands and sell them, turning over the proceeds to the railway company. Under any such condition the lands would have remained untaxable. But the state saw fit, on considerations of convenience and general benefit, to convey the lands immediately to the railway company and allow it to dispose of them. No good reason, we think, can be advanced why, if the lands could have been held by the state untaxable, the trust title cannot be vested in the company by contract, with the provision that they

shall be in that condition untaxable, or taxable only in a certain manner.

Second, as to lands of the United States, like those of the Northern Pacific here in question. The state had, under the charter of the Northern Pacific Railroad, absolute veto power on the construction of the road through Minnesota and on the acquisition of these lands by the company. This absolute power included the right of the state to have given a conditional consent and to have said to the company, that it might construct its road through Minnesota in consideration of releasing or conveying to the state its land grant within the state, on terms that the proceeds of such land should be turned over to the company as the lands were sold. To have imposed such condition was perfectly within the power of the state. Now, instead of saying this, the state said to the company, you may build your road and take the title to these lands from congress in consideration of your paying to the state three per cent. of gross earnings, the lands to be taxable in no other manner.

In either of these cases it is taking an extremely narrow view to say that the state has no right to make a *bona fide* contract, under which it gets the full benefit of taxation, under which it receives a full *quid pro quo;* and this case must be considered as if the state did receive a full *quid pro quo,* because we are discussing the *power* of the legislature, not the wisdom of its contract. In either of the cases supposed the state is not bargaining away any present right which it has to

tax the lands. It is parting with nothing. It is bargaining to set aside for a public use its own property, or property held upon a public trust, which it cannot tax so long as so held, and fixes the taxation as part of the contract of grant. The case we submit is widely different from that put by one of your honors on the former argument, of a state bargaining with a private individual for exemption of his private property, in consideration of his bringing it into the state. The constitution was intended to prohibit all bargains of that sort as to private property. It provides that such property shall be taxed.

It must not be forgotten that the state is a sovereign. It has power to grant charters and franchises, and to make contracts. No provision of the constitution restricts in terms its power to *contract*. It is not reasonable to infer a restriction of that power from a constitutional provision, that taxes shall be levied uniformly on all property at its true value. Can such a provision be held to forbid a contract by which the legislature secures a full equivalent for taxes? How is the case distinguishable from those which have been frequently passed on by this court, with respect to which the court said in *Jefferson Bank v. Skelly*, 1 Black, 436, 446:

> "This court has also decided that the charter of a bank is a franchise which is not taxable as such, if a price has been paid for it which the legislature has accepted with a declaration that it shall be in lieu of all other taxation."

It seems to us that the argument, which underlies the opinion of the supreme court of Minnesota, is distinctly contrary to those decisions of this court, which have held that the state has power to contract with respect to taxation. It is doubtful if there is any state constitution, which does not contain provisions either express or implied, requiring uniformity of taxation and forbidding discrimination. It has been argued for a hundred years, and certain justices of this court have argued from time to time, always in dissenting opinions, that it was incompetent for a state to contract on this subject; impossible for one legislature to bargain away the right of future legislatures to tax as they please. But this court has held uniformly that it was competent for a state legislature to make such contract. These decisions, we think, must be adjudications to the effect, that the courts cannot say that such contracts fairly entered into are contrary to a constitutional provision requiring uniformity of taxation; for as before stated, there is probably not a state constitution under which uniformity is not required.

In *State of New Jersey v. Wilson*, 7 Cranch 164, the legislature made a settlement with Indians, by which the Indians released certain lands to the state and certain lands were purchased by the Indians with a provision that they should thereafter be subject to no tax. This was held to constitute a contract which could not be rescinded by subsequent legislation. We know of no subsequent de-

cision in this court questioning this case and think it has been uniformly followed.

In *Gordon v. Appeal Tax Court,* 3 How. 133, the legislature of a state accepted from a banking corporation a payment as a consideration for the franchise granted, with a provision that the state was not to "impose any further tax or burden upon them during the continuance of their charter under this act." Held: to be a contract which the legislature had power to make and which could not be subsequently repealed.

In *State Bank of Ohio v. Knoop,* 16 How. 369, a grant was made of a charter to a bank, providing that no more than a specified amount of taxes should be levied on its property during a term of years. This court held that this was a contract binding on the state, reversing the supreme court of Ohio which had decided to the contrary. This case was followed by *Jefferson Bank v. Skelly,* 1 Black which involved the same state of facts.

In *University v. People,* 99 U. S. 309, this court construed a grant of exemption from taxation made by the legislature of Illinois to Northwestern University and held that a later statute impaired the obligation of the grant of exemption. The case was a writ of error to the supreme court of Illinois and the state court had held that the original contract made in 1855 was invalid, because in conflict with the state constitution of 1848. The state court had held that the legislature in 1855 had no right under the state constitution to exempt any-

thing except property in immediate use for school purposes; but this court reversed that decision, holding the construction placed by the supreme court of Illinois on the state constitution was erroneous, and that the legislature had power to contract for exemption of *all* the property of the university.

In *Asylum v. New Orleans*, 105 U. S. 362, an institution for the relief of destitute females had been incorporated in 1853 by act of general assembly which exempted all the property of the corporation from taxation. A decision of the supreme court of Louisiana held, construing this exemption, that it did not include certain kinds of property, but this decision was reversed in this court.

V.

The alleged contract was acted on in good faith and executed. It has been treated as valid by all departments of the state government for thirty years and was never attacked until the passage of the act of 1895. *This long practical construction, the long continued payment of the gross earnings percentage, with the investments which have been made in the state, forbid that this construction should now be changed to the detriment of vested rights.*

Without considering for the present whether the court below is correct in its interpretation of the

state constitution as an original question, we wish to explain the history of legislation in Minnesota and show the *practical* construction, which the constitution has received from all departments of the state government; and also to state in a general way the vested rights which have accrued in reliance thereon.

The system, of providing for taxation of railroad lands through payment of a percentage of the gross earnings of the road in lieu of other taxes, was universally in vogue in Minnesota in territorial times, and after the admission of the state and the adoption of the constitution in 1858 the Legislature invariably assumed that it continued to possess the same power, whether the railroad grant was the absolute property of the state, or was public land of the United States. This was the practice not only as to old grants adopted before the constitution, but also as to new grants both state and congressional made after that date.

Confirmation and construction by the courts will be found in the cases cited under the last head. There we think we have succeeded in showing that the supreme court has repeatedly *sub silentio* and several times expressly decided,that this legislation was within the power of the legislature to pass. The Parcher case and the decisions following it, which we have cited under the preceding head, have universally been regarded as the law of the state until the decision in this case. It is unnecessary to dwell on the fundamental importance and sacredness of the rule of property so established.

To show the course of legislation on this subject after the adoption of the constitution, we cannot do better than to quote from the opinion of the supreme court of Minnesota in *State v. Luther,* 56 Minn., pp. 163-4:

> "Among the congressional grants made subsequently to the adoption of the constitution to aid in the construction of railroads in this state, are the act of March 3, 1865, (13 U. S. Stat., p. 526), increasing the grant of 1857 to ten sections per mile; the act of May 5, 1864, (13 U. S. Stat., p. 64), making a grant to aid in the construction of a road from St. Paul to Lake Superior; the act of May 12, 1864, (13 U. S. Stat., ch. 84, sec. 7, p. 74), granting four additional sections per mile to aid in the construction of a road from St. Paul and St. Anthony to the southern line of the state; the act of July 4, 1866, (14 U. S. Stat., p. 87), making a grant to aid the construction of what is called the Hastings & Dakota Railroad; the act of July 2, 1864, (13 U. S. Stat., p. 365), making a grant directly to the Northern Pacific Company to aid in the construction of its road.
>
> "Among the grants made by the state itself for like purposes were that of March 6, 1863, (Sp. Laws 1863, ch. 4), of swamp lands to the St. Paul & Pacific Company to aid the construction of a road from St. Paul to Winona; the act of February 16, 1865, (Sp. Laws 1865, ch. 1), granting swamp lands to aid the construction of the Southern Minnesota Railroad; the act of March 8, 1861, (Sp. Laws 1861, ch. 1, sec. 18), making a grant of swamp lands (to which the lands here in controversy in part belong) to aid in the construction of the road from St. Paul to Lake Superior.
>
> "And in every instance the legislature, in making or transferring the grant to the railway company, provided for the exemption of the lands from ordinary taxation while owned by the company, in consideration of its pay-

ing to the state, annually, a certain percentage of the gross earnings of the road. They provided for the same system of taxation for the Northern Pacific Company, which received its grant directly from Congress. Sp. Laws 1870, ch. 65, sec. 1.

"In brief, the legislature assumed that when making a grant of lands to aid the building of a railway, or in executing the trust where lands had been granted to the state by congress for the same purpose, (and which, while thus held by the state, either as proprietor or in trust, were, of course, not subject to taxation), it had the power, in the furtherance of the object for which the grant was made, to exempt such lands from ordinary taxation, and to provide for commuted taxation of both the railroad and the granted lands.

"There is not in the history of the state a single grant of lands to aid the building of a railway, where this system of commuted taxation has not been adopted, and we have not found an instance, prior to the adoption of the constitutional amendment of 1871 (Const., Art. 4, sec. 32a) where a commuted system of taxation was provided that did not apply to a land grant as well as to the railroad property. This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight."

The original and largest land grants in Minnesota had been created by congress in 1857, the same year during which the Minnesota convention was sitting discussing the constitution of the proposed state and during which that constitution was finally adopted. The state was admitted in 1858. The men who framed the constitution were among the most eminent in the state; the convention was composed largely of leading lawyers

and subsequent judges and legislators; these men as well as the people knew only of taxation of railroad land grants by gross earnings; there was not a previous grant taxed in any other way; the framers of the constitution were afterwards legislators, judges and executive officers of the state; these very men at once upon the admission of the state commenced to pass laws conferring land grants on railroads on terms as to taxation precisely the same as theretofore in vogue. A number of these laws are mentioned in the extract above quoted from the opinion of the court in *State v. Luther*; but this enumeration might be largely added to. Note for example the series of laws contained in special laws of Minnesota 1865, chapters 1 to 10 inclusive. It never occurred to the legislators, many of whom had been in the constitutional convention, that these laws were obnoxious to the state constitution. As the supreme court well says in the case last cited, "This amounted to a legislative construction of the constitution which of itself would be entitled to great weight." And when we find the courts, as heretofore shown, sustaining as valid contracts, not only state regrants of forfeited territorial franchises, but state original grants, this legislative and judicial construction must be considered to have settled conclusively and forever, that such grants were not obnoxious to the constitution.

The same class of legislation was extended to other subjects besides railroads and railroad land grants. In the first tax law passed after the adop-

tion of the constitution (chap. 1, Gen. Laws 1860) the legislature in section 2 made a provision by which the tax payer could offset against the assessment of credits any indebtedness which he might owe. Although this provision would be unconstitutional according to a technical and literal reading of section 3, article IX *supra*, and had been so decided in Ohio before we adopted the section (*Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1) it has always remained a feature of the tax laws of Minnesota. It has been in force and universally acted upon for 39 years. And in *State v. Moffett*, 64 Minn. 292, the constitutionality of the act being challenged, the court declined to consider the subject upon its merits, or to indicate what conclusion might be arrived at if the question were an open one, saying:

> "We regard the point submitted as foreclosed by the practical construction which has been placed upon sections 1 and 3 of article IX for almost 40 years, really during the entire period of statehood, by the legislative, executive, and judicial branches of the state government."

The court goes on to show that in 1860 such a provision was introduced into the tax law, where it has always remained; that in 1864 the attorney general of the state rendered an opinion that the law was unconstitutional, but notwithstanding this opinion the executive department of the state had always recognized the validity of the law, the legislative department had gone on the theory that it was valid, and it had silently been taken for

granted in the judicial department; and that in this construction the people of the entire state had acquiesced for nearly two score years.

It thus appears as if in the state court 40 years of practical construction is sufficient to make valid one class of legislation; and not sufficient to make valid another class of legislation, the objection being the same against both and the practical construction being the same in both cases. There is really no difference between the two cases except the inclination and desire of the state court to hold one piece of legislation valid and the other piece invalid.

In 1872, amended in 1876, the legislature of Minnesota passed an act for the taxation of insurance companies by a percentage of premiums in lieu of other taxes on all real and personal property (see Gen. Stats. 1878, sec. 315, p. 433). Taxation of insurance companies by the same method has prevailed ever since without question and goes on in the state of Minnesota today.

Mining companies were taxed under the law of Minnesota according to the tons of ore mined, and this was held unconstitutional in the case of *State v. Lakeside Land Co.*, 71 Minn. 283. But there had been no such long practical construction of the law as to mining companies. The law was a general law. There was no question of contract involved, the law not taking the form of a contract and no investment having been made in reliance thereon. And moreover, the tons of ore mined is no sort of criterion to the value of a mine, as the earnings of

a railroad are a criterion of the value of a railroad. This last suggestion will be further considered under the next point.

Thus we have in Minnesota a system of railroad taxation of 40 years' standing, a system of taxation of credits nearly as old, a system of taxation of insurance companies 25 years old, the validity of which has passed unquestioned until quite recently. Not only the legislature, but the executive, the courts and every branch of the state government, and the people themselves, have during all these years considered this legislation as valid. The controlling force of a long continued practical construction of this sort is held in a line of decisions in the supreme court of Minnesota. *Carson v. Smith*, 5 Minn. (Gil.) 61; *Green v. Knife Falls Boom Corp.*, 35 Minn. 161; *City of Faribault v. Misener*, 20 Minn. (Gil.) 352; *Ames v. Railroad Co.*, 21 Minn. 288; *State v. Moffett*, 64 Minn. 292; *State v. Luther*, 56 Minn. 156, 162.

The cases are also numerous in this court, where it has been held, that co-temporaneous interpretation of a constitution practiced and acquiesced in for years conclusively fixes its construction. *Stuart v. Laird*, 1 Cranch. 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Cooley v. Port Wardens*, 12 How. 299; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53; *The Laura*, 114 U. S. 411.

As the court forcibly put the matter in *U. S. v. Burlington Ry. Co.* 98 U. S. 334:

"Such has been the uniform construction

> given to the acts by all the departments of the government. Patents have been given, bonds issued, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

As shown by the opinion of the Minnesota supreme court in *State v. Luther*, the provision here claimed to be unconstitutional has been incorporated into every railroad grant ever made in Minnesota. These grants have been accepted in good faith and enormous sums of money have been invested in reliance thereon. It appears in the record that the Northern Pacific Railroad was built through the state of Minnesota (about 250 miles) in reliance thereon, built it is not unreasonable to assume long in advance of the possibility of profitable operation; years ahead of the time when it would have been built except for that and similar inducements. The state has been populated, its interests developed, its property made valuable by the construction of this and other railroads, and investors cannot now be put in *statu quo;* the state cannot refund what was invested in reliance upon a construction of the constitution, which the court now says 30 or 40 years afterward was incorrect. The roads have during all these years paid into the state treasury three per cent annually of their gross earnings, state and interstate, though the power to tax interstate earnings is and always has been doubtful (*McHenry v. Alford*, p. 670). The state

does not propose to refund. And the law of 1895 continues the obligation to pay the same gross earnings assessment. Negotiable bonds have been issued secured by mortgages on these railroads and have been dealt in by the commercial world in reliance on the validity of these contracts, and their validity was never challenged until in the year 1895, when the legislature passed the tax act in question.

Not only should this court follow its own judgment as to the constitutionality of the laws of 1865 and 1870, but considering the long practical construction and the large investments in reliance upon that construction, the case falls within those decisions of this court, which have held, that, where when contracts are made, the law of the state as interpreted by its courts is in favor of their validity, a subsequent decision of the state court to the contrary will not be followed in this court; *Gelpcke v. Dubuque*, 1 Wall. 175; *Thomson v. Lee*, 3 Wall. 327; *Mitchell v. Burlington*, 4 Wall. 270; *The City v. Lamson*, 9 Wall. 477; *Douglass v. Pike*, 101 U. S. 677.

VI.

As to the true construction of sections 1 *and* 3, *article IX of the state constitution.*

Section 1 does not differ from the provision in the organic act of the territory of Dakota, which was construed by this court in *McHenry v. Alford*,

168 U. S. 651. The organic act provided that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

This language in the organic act of North Dakota contained two prominent limitations on legislative power; first, that taxes should be uniform, second, that they should be in proportion to the value of the property taxed. The organic act therefore contained all the provisions of sections 1 and 3, article IX, of the Minnesota constitution, except the one provision of section 3, to the effect that laws shall be passed taxing all property.

This court held in that case that there was nothing in this provision of the organic law, which prohibited the legislature from passing a gross earnings law, under which the railroad company paid a percentum of its gross earnings in lieu of all other taxes on the railroad and land. The case decides (a) that such a law provided for taxation not exemption (b) that such taxation is not contrary to the rule of uniformity; (c) that the taxation is *in proportion to value*. So far as the opinion of the supreme court of Minnesota in this case (72 Minn. 22) holds that the act of the legislature violates the constitutional rule of uniformity, or so far as it holds that the taxation in question is not based on value, it is contrary to the decision of this court in *McHenry v. Alford*, and contrary to the authorities which this court cited with approval, 168 U. S. 699.

And when the state court says that a state could not *contract* it runs counter to the settled rule in this court, which we have before referred to, that a state can make a contract on the subject of taxation.

Possibly the decision of the state court may rest partly upon that part of section 3 which says, "Laws shall be passed taxing *all* moneys," etc., and also, "*all* real and personal property according to its true value in money." But it is clear, and has been decided by this court in *McHenry v. Alford*, that the legislature may classify and arrive at the value of different species of property in different ways: it may for example tax improved property by percentage on rental or income, unimproved property directly by ascertaining its value.

Section 1 says, that the legislature may select the property which is to bear the burden of taxation and need not levy taxes on all property. If section 3 is to be read literally and strictly so as to compel the passage of laws taxing absolutely *all* property, it conflicts with and is contradictory of section 1.

But the two sections stand in the constitution together as both operative and as modifying each other. Some construction must be adopted which will give the fullest effect to both.

It may be pertinently pointed out that section 3 is not self-executing but is directory to the legislature. It says that laws shall be passed etc. Suppose the legislature fails to pass any law taxing mortgages, for example, it could not be contended

that mortgages were taxable. Neither, we apprehend, would a court decide that all the taxes assessed in the state were void because the legislature had not passed a law taxing mortgages. *State, Vail's Exrs. v. Runyon,* 41 N. J. Law. 98. And therefore it may well be held that section 3 was not intended to overrule section 1 so far as concerned the power of the legislature to determine where the burdens of taxation should be placed (of course, without unjust discrimination) and to classify property into different classes for the purposes of taxation.

The utmost that can be claimed by the learned attorney general is that there are three important requirements as to taxation in the Minnesota constitution; (a) that laws should be passed by the legislature taxing all property (b) that taxation shall be based on value (c) that it shall be uniform.

(a) That these laws comply with the first requirement is not doubtful. They tax the property and do not exempt it. This was decided by this court in *McHenry v. Alford.* It has also been decided by a uniform line of cases in the supreme court of Minnesota. In the Parcher case the court distinctly overruled the argument that the grant was an exemption and without consideration, and said that it was a franchise or right based on a sufficient consideration; namely, the agreement to construct the road and to pay perpetually 3 per centum of the gross earnings thereof. In *City of St. Paul v. St. Paul & Sioux City R. R.*

Co., 23 Minn. 469, the court said that the statute should be liberally construed, because it was not an exemption statute, but merely provided a mode of commutation of taxes, which was equally advantageous and beneficial to the state, as direct ordinary taxation; that this method of taxation was adopted because it would prove less vexatious and burdensome to the companies and ultimately more advantageous and productive of revenue to the state, and clearly more just and equal to all localities thereof. In *State v. Winona & St. Peter Co.*, 21 Minn. 472, the court said that the 3 per cent was provided as a commutation for taxes and that this commutation was one of the inducements held out to the company to undertake the enterprise. In *County of Hennepin v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 33 Minn. 534, the court again said, that this was not an immunity from taxation, but a commutation of taxes, another and substituted way prescribed by law, in which the company, as owner of the land among other property, contributes its share to the public revenue. In *County of Ramsey v. Chicago, Milwaukee & St. Paul Ry. Co.*, 33 Minn. 537, 542, the court said: "It must be supposed that it was contemplated, that this system would, upon the whole, fairly effect the objects of taxation with respect to such corporations, and be equivalent in its results to taxation of the property owned by them." Again, the court said in *County of Todd v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 38 Minn. 163: "That the purpose of such taxation is to secure to the

state its proper revenue from the taxable property of these corporations." In *St. Paul v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 39 Minn. 112, the court again repeated that these charters did not exempt the property from taxes, but provided a substituted method of taxation, based upon the assumption that the property of the companies was to be used for railroad purposes, and thereby an income be derived, the percentage of which, received by the state, would be equivalent in its results to the ordinary taxation of the property. Again in *County of Martin v. Drake*, 40 Minn. 137, it is said, that the percentage of gross earnings paid by the company is merely the equivalent of a tax it would have to pay, had a tax in specie been assessed. Finally, the supreme court of Minnesota said in *Marr v. Luther*, 56 Minn. 156, 160: "It is a common error, in construing statutes like the present, to assume that because the commuted tax is fixed with reference to, and is wholly derived from, the gross earnings of the road, therefore the lands are exempted from taxation altogether. The percentage of the gross earnings is paid as taxes on both the railroad and the granted lands, and, although derived wholly from the former, is a commutation tax alike on both." Again the court pointed out in the same case (on page 162) that there is nothing in the suggestion that these laws are unconstitutional as to the land grant but valid as to the railroads. The court said that the laws must be all valid or all void, first, because the gross earnings tax was a tax on both the road and the

land, and secondly, the vice, if there be one, in the commuted system of taxation, would apply to one class of property as well as the other; and if there is anything in the point both classes of property, namely, the railroads themselves and the land grants, must under the constitution be taxed directly by assessment according to their true value in money.

This court decided distinctly the same thing in *McHenry v. Alford.*

Therefore, it is not open to debate

that the laws in question are not exemption laws and do tax the land. Therefore they comply with the requirement of the Minnesota constitution, that laws shall be passed taxing all property.

(b) Next, the taxation is based on value. This proposition is also held in the cases before cited, both in the decisions of the supreme court of Minnesota and in the decision of this court in *McHenry v. Alford.* The question was fully and elaborately argued in *McHenry v. Alford* and the decision there made is correct in principle.

There are certain classes of property, notably property devoted to a public use and operated under franchises, like the property of a carrier, the value of which can be best ascertained by earning capacity. Note what this court said as to ascertaining the value of a railroad in *Smythe v. Ames.*

Take, for example, a railroad; it has no market value; there are no purchasers; so much money may be invested in it that no person or aggregation of persons would furnish the

capital to buy it. Yet it has a value as a system or entity which can best be determined by its earning capacity. The same is true of any property incapable of separation from franchises with which it is used, the whole constituting a taxable entity with a value depending on earning capacity, or at least which the legislature *may* determine by earning capacity. And the legislature is not confined to taxing such property by direct assessment of such part thereof as is tangible and has an ascertainable market value. *McHenry v. Alford*, pp. 665-668; *Adams Express Co. v. Kentucky*, 166 U. S. 171; *Adams Express Co. v. Ohio State Auditor*, id. 185.

Mr. Morawetz, in his work on Corporations Section 929 says:

> "In speaking of the value of franchises, care must be taken to distinguish between the different meanings of the word 'value.' One meaning of the word is *price*, or the amount for which a thing can be sold. In this sense franchises have clearly no value whatever, because, by their nature, they are not transferable. They cannot be sold, or leased, or mortgaged, nor can they be taken on execution. On the other hand, franchises clearly have a value, if the word 'value' is used to signify the advantage derived from their possession, or, in other words, their utility. The value of a franchise, using the word 'value' in this sense, would not be measured by the cost or difficulty of obtaining the franchise, or by its exclusive character, but by the benefit derived from its possession."

The determination of value by rental or income can not, we submit, be held not to be a constitu-

tional assessment according to value. It is an elementary principle of political economy that rental or earning capacity is one of the very best tests of value. And in order to hold that taxation of a railroad by an annual percentage of gross earnings is not taxation of the property according to its value,the court must overrule this fundamental principle and say,that earning capacity may not be taken as a test of the value of property difficult or impossible to determine directly. The court must hold the very narrow view that no appraisal is based on value, except the ordinary direct and specific assessment of value; when we all know, as a fact, that as to all property operated under and with franchises earning capacity is the best index of value.

If this is true with respect to taxation of railroads it is true of the taxation of these land grants as a single entity with the railroad. These grants were universally granted to aid in the construction of some railroad. Take the Northern Pacific grant as an example. Its lands were granted by section 3 of the act of July 2, 1864. "For the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores." The lands were held upon a trust created by act of Congress for the purpose of aiding the construction of the railroad. Neither the lands nor their proceeds could lawfully be applied or used for any other purpose whatever. While held on this trust they could

not be made productive; they could not be built upon, cultivated, improved, and made a source of income to the company; they were necessarily held for sale, the proceeds of sale to be devoted to railroad purposes strictly, and to paying off mortgages, the money raised upon which had constructed the road. The lands could not be sold and the proceeds appropriated by the stockholders in the way of dividends or otherwise. They are wedded to and inseparable from the railroad itself. Without them coupled with the commuted taxation, the road might not have been built. The railroad earnings are produced partly by the lands, because the value of the lands has already been borrowed thereon and put into the road; the lands are and must continue to be held to aid the road and enable it to produce earnings. *McHenry v. Alford*, pp. 660, 661, 662; *State v. Luther*, 56 Minn. 156.

We are not, therefore, asking the court to hold that the Minnesota legislature could exempt any property from taxation. We can safely concede, that it is the duty of the legislature under the constitution of the state, to tax all property at its value in money. But here we have a kind of property which is *sui generis*, consisting of a franchise, with a land grant devoted to the purpose of building a railroad; the whole consisting of one entity, upon which it would be difficult—if not impossible—for any person to put a direct value in money. Instead of trying to do so the legislature has said that the whole shall be assessed each year by taking 3 per cent of the gross earnings. Under this sys-

tem, as the earnings increase taxes increase, and it is fair to assume that as value increases earnings increase. It cannot be said that this property is not taxed, neither can it be said that it is not taxed in proportion to its value. All that can be said is that the value is ascertained indirectly instead of directly. But it was for the legislature to fix the *method* of ascertaining value. There is nothing in the constitution which provides that value shall in all cases be fixed by a direct determination by an assessor, and if the *method* of taxation here in question may be regarded as resting on *value*, the selection of such *method* of arriving at value is purely a legislative question. Plainly it may be the case that this property has and would continue to pay substantially the same, or at least as much taxes, under the gross earnings system as under the other system. We believe railroad experience has shown this to be the case, but whether this is true or not the crucial question is whether the court can judicially know, that this taxation has not been in proportion to value; or whether on the other hand this is not purely a legislative question.

(c) As to the requirement of uniformity, it was decided by this court in *McHenry v. Alford*, that the taxation in question was not contrary to the requirement of uniformity. The only refuge of our opponents is to say, that while the taxation in question might be uniform for one year, its uniformity is destroyed because the legislature has fixed the rate of taxation for a considerable number of years, or so long as the company holds the lands unsold.

The learned attorney general will, we think, be driven to concede that the property is taxed and that it is taxed on value; that the rule of uniformity is not violated unless it be on account of the rate of taxation being fixed for a considerable period. And this is the point to which this part of the case is ultimately reduced as shown by the recent opinion of the supreme court of Minnesota (unreported) in *County of St. Louis v. Duluth and Iron Range Railroad Company*, where the court says:

> "True, these lands were conveyed for a public purpose and it may be conceded that in the absence of constitutional provisions prohibiting it, the legislature might in aid of such purpose have granted the lands exempt from taxation. But we are of opinion that under our constitutional provisions requiring uniformity of taxation, the legislature cannot, even in aid of a public purpose, make an irrevocable contract exempting private property from future taxation, because, even if it is admitted that thereby the legislature did nothing more than anticipate such future taxes and apply them in advance to a specific public purpose, still, it is impossible for the legislature to tell at present what in such a case will be uniform taxation in the future, or that by such arrangement such property will bear its just and equal share of such future taxation."

This argument concedes *that the laws in question were valid as laws and provided for valid taxation for the time being. It bases their invalidity entirely on the contract feature.*

There are several answers to the argument.

First, the legislature is not confined by the constitution to fixing a new rate of taxation every

year. Neither is there, as we think, any provision in the constitution which requires that the legislature shall fix the rate on *all* property at the same time, or for the same term. May not the legislature fix the rate on land for five years to come and leave the rate on personal property to be fixed annually? Would that be contrary to the rule of uniformity? It must be remembered that the legislature is vested with all the power on this subject, except as it is limited by express constitutional limitation. General legislative power rests in the legislature and it may fix the valuation and rate itself, or delegate such fixing to subordinate bodies. The legislature must be the judge (unless it is expressly deprived of that power) as to whether fixing the rate of taxation with respect to a certain class of property for a considerable term violates the rule of uniformity, because the rate on other classes of property is fixed annually or bi-ennially. How can the court say that thereby less taxes are collected against the property for which the rate is fixed for a long term? In fact all the legislature has done is to classify; the classification rests on reasonable grounds, and so far as appears all members of the class are taxed alike. *McHenry v. Alford*, 168 U. S. 651; *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232; *Home Insurance Co. v. New York*, 134 U. S. 594; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Giozza v. Tiernan*, 148 U. S. 657; *Adams Express Co. v. Ohio*, 165 U. S. 194, 228.

Next, when we consider the history of Minnesota, it is little short of absurd to suppose, that these sec-

tions of the constitution *required* the legislature to tax railroads by direct assessment, as other property is taxed. We have already referred to the fact that before the constitution was adopted several railroad companies had been chartered and the great congressional grants made in 1857 had been parcelled out; every charter and every grant containing an irrepealable contract provision, without any power reserved to amend or repeal, for taxation both on the railroad and grant by 3 per cent of gross earnings in lieu of all other taxes. The men who framed the constitution and who formed the first legislatures of the state well knew of this condition, and by section 1 of the schedule attached to the constitution provided:

> "That no inconveniece may arise by reason of a change from a territorial to a permanent state government, it is declared that all rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place."

The constitution thus fastened upon the state the gross earnings system, at least as to a large number of railways and land grants.

And an amendment to the constitution, adopted April 15, 1858, provided for loaning the credit of the state to railroad companies and the issuing of Minnesota state railroad bonds. This provision of the schedule and the said amendment are what the supreme court of the state principally relied upon in the Parcher case, in reaching the conclusion that

the state was bound by the gross earnings contracts and had a right to re-grant franchises and property forfeited to the state. The framers of the constitution and the early legislatures well knowing, that many of the principal railway companies had irrepealable contracts with the state providing for gross earnings taxes, said in the constitution, *not that no more such contracts should be made, but that taxes should be uniform.* How could they have conceived that uniformity was to be secured except by taxing subsequent companies in the same way as those previously organized? That they so intended is sustained by the after history of the state, as before shown. If the contention of the learned attorney general in this case is correct, we have the monstrous result that the framers of the constitution intended a part—and a large part—of the railway companies should pay perpetually taxes by a fixed gross earnings percentage, and the companies competing with them, parallel with them, should pay taxes on a different basis at the will of the legislature. The Great Northern company operates the lines of the former St. Paul and Pacific and is perpetually entitled to pay in taxes only 3 per cent on its gross earnings, while the Northern Pacific company, its chief competitor, if the argument is sound, is bound to subsist on the same tariffs and on business derived from the same territory, and is obliged, as proposed in this law, to pay 3 per cent on its gross earnings plus ordinary taxes on all its lands; or may be compelled to pay taxes on any basis the legislature may fix. Is this

what the framers of the constitution contemplated when they said that taxes should be uniform?

In the next place, as we think, the argument is overruled by those decisions of this court which hold that a state has power to contract with respect to taxation. From the beginning this court has held that such a power to contract was inherent in every state government; not because of either the presence or absence of any particular provision in the state constitution, either conferring power, or making a limitation on power; but because of the inherent sovereignty of the state. And it is a startling proposition at this day that a state has no power to make a contract. It would need some plain and explicit provision of the state constitution to accomplish that result. Here, it is sought to *infer* the want of this power, naturally inherent in the sovereign, from a provision in the state constitution that taxes shall be uniform. But if we have convinced the court that these laws do tax the property, that they tax it in proportion to its value, and that they are good as far as respects the requirement of uniformity *as legislation*, it follows necessarily that they comply with the constitutional requirement as to taxation; and if they were valid tax laws, and if the state had any power to contract, to say that the state had no power to make *this* contract is to say that it had no power to contract for valid taxes. If this tax was uniform compared with other taxes in 1865,these laws were valid tax laws, and this court held in *McHenry v. Alford* that such a tax did satisfy the requirement of uni-

formity. If the laws provided for uniform taxation in 1865, what is there to show that they would not at any future time secure uniform taxation? What the state court has decided is that the taxation is not uniform because of its *contract* feature; that is, that there might arise in the future such a condition of things as that, for the time being, railroad companies would pay less proportionately than other property holders might be required to pay. On the other hand we may suggest with equal reason that these laws may require at other times, or on the average, a payment by railroad companies in excess of what other property owners pay. But how can the court know judicially that these laws have or ever will work any discrimination? There is no suggestion in the pleadings or proof in the record that they ever have or ever will. The state court has decided that the laws are void because they may possibly do so. But is not this shearing the legislature of all legislative power? Was it not for the legislature to judge as to whether these laws would in the long run operate fairly and uniformly? The supreme court of Minnesota has in many of its earlier opinions said that these laws do work uniformly, equitably and beneficially, both to the companies and to the public. If the acts were valid tax laws and operated with uniformity as laws, it was for the legislature to say how long they would continue to operate with uniformity and whether any contract ought to be entered into on the subject. What we have said under a previous head with respect to the

decisions of this court, holding a state has the power to contract as to taxation, is applicable here.

Various decisions of other state courts have been made touching constitutional limitations on the power to tax more or less similar—some of them almost identical—to those in the constitution of Minnesota. We refer below to some of the cases, all of them having been called to the attention of this court in *McHenry v. Alford* and most of them having been cited in the court's opinion.

The constitution of Wisconsin provides: "The rule of taxation shall be uniform and taxes shall be levied upon such property as the legislature shall prescribe." The question had been very much mooted and had been passed on or touched upon by different decisions of the supreme court from an early day, which decisions were not altogether consistent with each other. The question finally came before the supreme court of that state in *Wisconsin Central Railroad Company v. Taylor County*, 52 Wis. 37. It was elaborately considered by the court in its opinion, page 57, and subsequent pages, and the gross earnings tax upon railroad lands was held valid.

The constitution of Iowa (adopted 1846, sec. 30, Art. 3) declares "the general assembly shall not pass local or special laws * * * for the assessment and collection of taxes for state, county or road purposes * * * and in all * * *

cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Under this provision it was decided that an act of the legislature was valid, exempting all property, including the residences of professors, upon the grounds of literary institutions, and the dwellings of clergymen owned by religious societies, and used exclusively for such dwellings, without income to the owners. *Trustees of Griswold College v. Iowa*, 46 Iowa 275.

Section 1, Article II, of the constitution of Kansas, adopted in 1859, provides "the legislature shall provide for a uniform and equal rate of assessment and taxation." This is a very strong section, not only requiring uniformity of rate but equality of rate; but an act providing a different method of assessing and collecting taxes on railroad property than other property was held not to be unconstitutional. *Railroad Company v. Morris*, 7 Kan. 210. And in *Francis v. Railroad Company*, 19 Kan. 303, it was held, Brewer, J., giving the opinion of the court, that an act of the legislature providing for the collection of state taxes directly through the machinery of the state government, on railroad property in unorganized counties of the state, *where no other property was taxed*, was not in violation of this constitution.

The constitution of Louisiana provided "taxation shall be equal and uniform throughout the state. After 1848 all property on which taxes may be levied in this state shall be taxed in proportion to its value, to be ascertained as directed by law. No one

species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied." In *Louisiana State Lottery Co. v. New Orleans,* 24 La. An. 86, it was held that the lottery company might be exempted from ordinary taxation in consideration of its annual payment into the state treasury of a certain amount for the benefit of the school fund. And in *New Orleans v. Kaufman,* 29 La.An.283,it was held that the constitution did not prohibit the legislature from dividing the objects of taxation into different classes and imposing different taxes on each class. It merely required that the tax on each member of the same class should be the same. See also *New Orleans v. Davidson,* 30 La. An. 554, and *New Orleans v. Fourchy,* 30 id., 910.

The constitution of Michigan adopted in 1850, provided "the legislature shall provide a uniform rate of taxation except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law." And section 12 said "all assessments hereafter authorized shall be on property at its cash value." In *People v. The Auditor,* 7 Mich. 84, an act of the legislature of 1853, remitting certain taxes for the term of five years to the contractors of a ship canal under a land grant to aid the canal, was held valid, Martin, C. J., saying:

> "This provision of the constitution has no reference to the power to exempt or to remit taxes, which is, and necessarily must be, to a great extent, left to the discretion of the legislature. * * * The legislature has the pow-

> er of prescribing the subjects of taxation and of exemption, but it cannot arbitrarily tax property according to locality, kind or quality without regard to value, but in this respect it must act by uniform rule. But to exempt property as is done in the case of church, school, or library property, or to remit taxes for any cause, has nothing to do with the uniformity of the rule of taxation. Pages 90, 91."

Manning, J., said also:

> "There is nothing in the constitution in express terms inhibiting the enactments of the law by the legislature * * * The two sections taken together mean that all descriptions of property *subject to taxation* shall pay such proportion of a tax as their cash value bears to the aggregate cash value of the whole property subject to the tax."

And the judges agree that it was competent for the legislature to exempt the lands from taxation for five years. See, also, the opinion of the court by Judge Cooley in *Youngblood v. Sexton*, 32 Mich. 406.

The constitution of New Jersey, adopted in 1875, provided "property shall be assessed for taxes under general laws and by uniform rules, according to its true value." Under this provision it was held that an act exempting mortgages from taxation, except under certain conditions, was constitutional. *State, Vail's Exrs. v. Runyon*, 41 N. J. Law. 98.

Section 1 of Article 9 of the new constitution of Pennsylvania, adopted in 1873, provides, "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under

general laws; but the general assembly may, by general laws, exempt" certain property named. In *Kittanning Coal Co. v. Commonwealth*, 79 Pa. St. 100, it was held that an act taxing coal companies on their franchises according to the amount of coal mined is constitutional. Agnew, C. J., said, in the opinion of the court:

> "Clearly there is nothing in this (constitutional provision) prohibiting the power to classify. Will it be argued that persons or the owners of property cannot be classified? For example: can it be said that all single freemen cannot be required to pay a uniform tax? Or that the owners of horses or mules or of cattle cannot be taxed upon their horses, mules and cattle at a certain rate? Or that the owner of unseated lands, or farms, or mills, or houses and lots cannot be taxed at a uniform rate? What difference is there between saying that all horses and mules shall be taxed at a certain rate and saying that the owners of these horses and mules shall be taxed at the same rate upon them? The distinction is evidently unmeaning. Persons pay taxes, not property. This is so even when the remedy for the recovery of the tax is *in rem*. The law only takes hold of the property as a means of enforcing the duty of the person. When the constitution enjoins uniformity of taxation, it is because of the right of the citizen, not of a right possessed by his property. * * * Hence, when the constitution said that all taxes shall be uniform upon the same class of subjects within a given territory, it did not mean to separate the property from its owners, or that property and not persons should pay taxes. This would be simply absurd, for inanimate things cannot perform duties. Taxes shall be uniform, because of the right of the citizen to bear no more than equal burdens. * * * But without the power to classify men, as well as things,

this undesirable inequality cannot be avoided; for if visible or tangible things only can be classified for taxation, then those whose wealth consists in that which is not visible or tangible, though it be far beyond the few visible effects of the poorer citizen, will not bear their proper share of the public burden. And among corporations or artificial persons the same result will take place. * * * But by classification this inequality between persons, natural or artificial, can be avoided. It is clear, therefore, that the moment we concede the power to classify, we have disposed of the question of uniformity, for then all that is required by the constitution is uniformity of taxes among the members of the class. * * * We must conclude therefore that a classification of coal mining and purchasing and selling companies is not beyond the legislative power, and the tax being clearly uniform upon their business measured by the extent of it, is not only within the meaning of the constitution, but is equal and just."

The constitution of Mississippi provided, "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." In *Mississippi Mills v. Cook*, 56 Miss. 40, a statute was sustained providing for the exemption of all factories "for the manufacture of cotton and woolen goods, or yarns, or fabrics composed of those or any other materials."

The constitution of Illinois provided "the general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." But the exemption of the Illinois Central

Railroad Company from ordinary taxation in consideration of paying into the state treasury a percertage of its gross earnings was held valid in *Illinois Central Railroad Co. v. McLean*, 17 Ill. 291. In the case of *Hunsacker v. Wright*, 30 Ill. 146, it appeared that the charter of a city provided that its inhabitants should be exempt from performing labor on the roads beyond the city limits, or taxes to procure labor for such purpose, and the property within the city should be exempt from taxes levied for county purposes; provided the city should support the resident paupers thereof, and pay the expenses of the circuit court in all criminal cases for offenses committed by citizens, and all jail fees accruing therefrom. The court held that while under the Illinois constitution the legislature could not exempt a person or community of persons from their share of the public burdens, still the legislature might commute a tax for an equivalent burden, and that in commuting the general assembly was the sole judge of the sufficiency of the equivalent to be received in lieu of the tax.

In Arkansas the constitution provided "all property subject to taxation shall be taxed according to its value—that value to be ascertained in such manner as the general assembly shall direct; making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value." The decisions under this provision are quite numerous and for lack of space we merely refer to them. They will

be found to sustain our contention. *State v. Crittenden County*, 19 Ark. 360; *St. Louis R. R. Co. v. Berry*, 41 Ark. 509; *Arkansas Midland Ry. Co. v. Berry*, 44 Ark. 17; *Cairo Railroad Co. v. Parks*, 32 Ark. 131; *Memphis Railroad Co. v. Berry*, 41 Ark. 436.

VII.

We have presented the case thus far without any reference to the constitutional amendment of 1871, Art. IV, sec. 32a, which reads as follows:

> "Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state, or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of such railroad companies now existing, or hereafter organized, shall, before the same shall take effect and be in force, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."

The gross earnings tax laws were in this amendment, confirmed by the people and put beyond the reach of amendment or repeal, without their consent.

In order to fully appreciate the force and effect

of this amendment, it is necessary to take into consideration the history of the state and the condition of legislation on this subject at the time it was made.

When the amendment was adopted all the railroads in Minnesota were paying a percentage of their gross earnings in lieu of all other taxation. There was no general law providing for this method of taxation, but each railroad was paying its taxes in this way by virtue of some special law in the form of a contract with the state. This method of taxing railroads had been inaugurated by the territory of Minnesota before the organization of the state. (Chap. 1, Laws of Minnesota, Extra Session of 1857). The territory, when granting charters to various railroads, had provided that the payment of three per cent of their gross earnings should be in lieu of all other taxation, and most of the railroad companies operating in the state in 1871 were organized under such territorial charters and paying their taxes under contracts made with the territory. A few railroads were paying similar taxes under similar contracts made with the state after its organization, one of which was the Lake Superior and Mississippi Railroad Company, the predecessor of the St. Paul and Duluth Railroad Co., and another the Northern Pacific Railroad Co. Prior to 1871, the state legislature had, at various times, at the request of the various railroads, reduced for a limited period the percentage of gross earnings which the railroad companies had thereto-

fore agreed to pay. (See chapter 2, Special Laws 1861, chapter 17, Special Laws 1862, and chapter 2, Special Laws 1863, as to Minneapolis & Cedar Valley Railway Co.; chapter 18, Special Laws 1862, chapter 1, Special Laws 1864, as to Root River Valley and Southern Minnesota Railroad Company and its successors; chapter 4, Special Laws 1864, chapter 6, Special Laws 1865, chapter 52 Special Laws 1870, as to the Minnesota & Pacific Railroad Company and its successors; and chapter 10, Special Laws 1865, as to the Winona & St. Peter Railroad Company, successor of the Transit Railroad Company).

In several of the decisions of the supreme court of Minnesota, which we have cited *supra*, these reductions of taxation, made by the consent of the state and the companies, were considered and held valid. The Parcher case was decided in 1869 holding, as we have before shown, that these provisions for commuted taxation were contracts, subject to the protection of the federal constitution and could not be changed against the consent of the companies. It must therefore have been well understood in 1871 that the legislature could not amend or modify these laws without the consent of the companies.

The amendment must be construed with reference to this condition and with reference to the evil sought to be remedied.

The supreme court of Minnesota in this case has adopted a view of this question, which we conceive to be contrary to the history of the state and con-

trary to the motive and intent of the amendment. The court decided that the amendment was intended to validate the laws *as laws only*, but disaffirm them as contracts and leave them subject to repeal by the people *without the consent of the companies.*

But an examination of the language of the amendment and a consideration of the history, and situation at the time which was that the people were dissatisfied with the reductions of taxation and with the amendments of the contracts, which the legislature and the companies had theretofore bargained for, shows, that the purpose of the amendment was not to modify or change the existing system, or any of the laws on the subject, but to confirm those laws and prohibit the legislature from any further arranging with the companies to tamper with them. It is also clear from the amendment that the people were satisfied with a gross earnings system and wished to take it away from the power of the legislature, even with the consent of the companies, to change that system for a direct tax system.

The laws were on their face laws making contracts, and there is nothing in the amendment, which indicates an intention, to take anything away from the laws as they stood, or from the binding force of the contracts plainly contained in them; the whole purpose expressed was to preserve them and put a check on their amendment or repeal by the legislature. There is nothing in the amendment to indicate, that the people intended

to assert their invalidity and the right to change them without the consent of the companies. What is apparent is, that they intended the legislature should not change them, even with the consent of the companies.

That such was the intention and that this is the construction which should be placed on the amendment appear more clearly when we take into consideration, that the amendment applies chiefly to laws passed by the territory, which all must concede were beyond all controversy binding, irrepealable contracts. The people must *at least* have understood that they had no power to repeal or modify the territorial contracts without the consent of the companies. The Parcher case had been then recently decided. As the amendment draws no distinction between territorial contracts and state contracts, it must be held to intend to affect both in the same manner; therefore to provide, not that the people could change these contracts at will without the consent of the companies, but that the legislature should not change them even with the companies' consent.

What the supreme court of Minnesota has in this case decided upon this point is, if we understand the previous decisions of that court, contrary to what it had decided in earlier cases. In *City of St. Paul v. St. Paul and Sioux City Railroad Company*, 23 Minn. 469, 475, the court said:

> "And the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since as valid by both the executive and legislative departments

> of the state government, but, by an express constitutional amendment, adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by the vote of the electors of the state."

In *County of Stevens v. St. Paul, Minneapolis and Manitoba Ry. Co.*, 36 Minn., 467, 472, it was said:

> "The point that sections 1 and 3 of article IX of the constitution forbid this legislation was long ago settled in the Parcher case, above cited, and in the cases of *State v. Winona & St. Peter R. Co., supra*, and *City of St. Paul v. St Paul & Sioux City R. Co., supra;* it being held that those sections of the constitution did not prevent the legislature from modifying the terms of a provision for the payment of percentage of gross earnings in lieu of other taxation, in a case where that method of taxation had been established prior to the adoption of the constitution, and, in the latter case cited, that by the constitutional amendment of 1871 (section 32, article 4) such legislation had been confirmed."

Finally, in *State v. Luther*, 56 Minn. 156, 164, the court, in speaking of this amendment, used the following language:

> "This language must have been selected and this amendment adopted with reference to the existing legislation and the general legislative policy to which we have referred; and, read and construed in that light, it amounts to a clear recognition of the validity of existing laws providing for this commuted system of taxation of railroad property and lands, and of legislative power to enact such laws for the future. If it did not refer to this, there was nothing to which it could refer. It is, by necessary implication, a validation of past legis-

> lation of that kind, and a grant of power to enact it in the future."

If we understand the decisions quoted from, they hold that these laws were confirmed by the amendment according to whatever purport and effect the particular laws construed had. If they were only laws, they were confirmed as such; if they were laws making contracts, they were confirmed in their full effect.

As before shown, the principal companies and the principal land grants were in 1871 subject to irrepealable contracts with respect to gross earnings taxes. These contracts had been adjudicated in the Parcher case to be just as valid *as if they had been granted by the state legislature.* There is not we believe a syllable in any decision of the court or in any discussion, or in any public speech, or document issued at the time, to show that there was any doubt about the validity of such laws. These laws of the state, like the laws of the territory, professed on their face to be irrepealable contracts. There was no power reserved in the acts themselves to amend, alter or repeal, and no power was reserved in the state constitution. Therefore if the amendment of 1871 was intended to ratify or confirm anything, it must have been intended to ratify and confirm these acts *in the character which they professed on their face to have*; that is, as laws making contracts. On their face they were contracts. If confirmed at all they must have been confirmed as contracts. Or-

dinarily, as between private individuals, ratification must be of a thing in its entirety. One cannot ratify in part without ratifying in whole. And presumptively, even in the case of a state, where the state confirms, it confirms *in toto* and according to the whole intent and purport of the thing confirmed, making it in all respects as if power had existed in the legislature at its date. There is not a word or syllable in this amendment which affords any ground to suppose, that the people thought, when the amendment was passed, that these state laws were invalid and that they intended to validate them as laws simply and affirm their invalidity as contracts.

C. W. BUNN,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 20.

FRED STEARNS, as County Auditor of Aitken County, Minnesota,
Plaintiff-in-error,

AGAINST

STATE OF MINNESOTA on relation of James N. Marr,
Defendant-in-error.

Additional Brief for Plaintiff-in-error on Reargument.

I respectfully refer the Court to the brief filed on behalf of the St. Paul and Duluth Railroad Company at the last Term of this Court, and to the supplemental brief on behalf of the same Company, which we desire to consider as filed as briefs upon the reargument.

I submit the following additional points:

I.

We understand that it is substantially conceded on the part of the State that even prior to the Constitutional Amendment of 1871 it was within the power of

the Legislature from year to year to impose a tax upon the gross earnings of Railroad Corporations instead of taxing the specific property used by the Railroad for railroad purposes, and that such a method of taxation was constitutional.

In other words, the mere fact that railroads were taxed upon their gross earnings while other corporations or individuals were taxed upon their specific property was not in violation of the constitutional requirements of uniformity and equality in taxation. The contention is, not that such a method of taxation is *per se* invalid, but that the Legislature could not fix a rate for the future so as to bind future Legislatures, nor could it apply this method of taxation to the lands granted in aid of construction, but only to the railroad property actually used for operating purposes.

Even if not conceded, we take it to be established beyond room for serious controversy that the taxation of railroad property by a tax on gross earnings instead of by a valuation of, and by a specific tax upon, its real property and chattels, is not a violation of the uniformity and equality clauses of the Constitution of Minnesota.

The decision of this Court in *McHenry vs. Alford*, 168 U. S., 651, expressly *held* that a tax on gross earnings in lieu of all other taxes was not in conflict with the provision of the organic law of Dakota Territory, providing that there shall be *no* "*discrimination*" in taxing "different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed." We, therefore, assume this proposition to be settled law in this Court.

Starting, then, with the proposition that a gross-earnings tax is not *per se* unconstitutional, we proceed to the next proposition, which is likewise established by authority, that lands granted in aid of construction are so far an integral part of the railroad system as to be properly included in the system for purposes of taxation, instead of being taxed separately. If anything can

be considered settled by adjudication in the Supreme Court of Minnesota as well as in this Court, it is that the acts on which we rely do not provide for an exemption, but provide for a commutation. This Court so held in the *Alford* case. Lands granted in aid of construction stand on the same footing as stations, terminals or rolling stock. They are held for railroad purposes only, and not as otherwise productive. The acts in question provide that as soon as the lands are leased or sold they become taxable as lands. Until leased or sold they are taxable as part of an indivisible entity.

See the Minnesota cases cited in our main brief.

II.

Having reached this stage in the discussion, we proceed to inquire whether a distinction may be drawn between an act imposing a gross-earnings tax in a given year and an act fixing a percentage of gross earnings in lieu of all other taxes for all time.

It is suggested that what may be a proper tax for the current year and may not involve any violation of uniformity may become such violation by change in circumstances from year to year. We submit that this distinction is without substance. The fixing of an arbitrary percentage of gross earnings is just as much an infraction of the uniformity clause of the Constitution, if it be an infraction at all, whether fixed for one year, or for ten years, or for twenty years, or forever. Let us look the matter squarely in the face: Is is not as much an infraction of the constitutional requirement of uniformity to say that A, B and C shall pay a tax for the current year of three per cent. on their gross earnings, while D, E and F shall pay the ordinary tax upon their lands and chattels, as it would

be to say that A, B and C shall continue to pay a tax on their gross earnings for a period of years? In other words, is there any logical or rational distinction between the power to discriminate in this manner for one year and the power to discriminate for a longer period or perpetually? The real difficulty lies in justifying this mode of taxation at all. When it is once conceded, as it must be, that, in spite of its apparent lack of uniformity, it is a legitimate exercise of the taxing power of the State, then it is, we submit, equally legitimate without regard to the period to which it is applied. It is to be borne in mind that the tax is not a stationary or arbitrary sum fixed for all time. It is a fixed proportion of the gross earnings; but the gross earnings are changing from time to time, and in the natural course of events are increasing from year to year, and as they increase, so will the tax increase automatically. Furthermore, it is not a tax on net earnings, the amount of which might be made greater or smaller by the management of the company, but it is a tax on the gross earnings which practically regulate themselves by the growth of the country through which the railroad runs and which naturally increase in the absence of gross mismanagement or undue competition.

To sum up our argument on this branch of the case, it is this: when it is conceded that a tax for a given year of a definite percentage of gross earnings, in lieu of all other taxes, is not a violation of the constitutional provisions for uniformity and is not an unlawful exemption of property from taxation, then it must be conceded that such a tax is lawful, if imposed year by year at the same rate of three per cent. and without readjustment from time to time to harmonize with the general scheme of taxation. If, therefore, the Legislatnre can do this year by year, there is no reason why the Legislature cannot do it in advance for a period of years: and if it has the constitutional right to fix the rate of taxation

for a period of years, then it has a right to make a contract with regard to the subject matter in which the rate shall be fixed.

The argument that what may be a fair rate of taxation to-day, as compared with other taxation throughout the State, may cease to be fair ten years from now, is, we submit, fallacious, since this scheme of taxation is not based upon the theory of equalizing the taxation of railroad companies with the taxation of other corporations or individuals throughout the State.

It cannot be seriously claimed that, when the Legislature of the State of Minnesota imposes or sanctions a tax of three per cent. on the gross earnings of a railroad company, it takes into consideration the taxes paid by other corporations or individuals in the community, and computes the three per cent. so as to impose an equality of burdens. Whether the three per cent. tax on gross earnings, imposed upon railroads, is a greater or less burden than that imposed upon individuals upon their real and personal property, or that imposed upon other corporations in the State of Minnesota, cannot be told without a careful examination and a complicated computation. Railroads may be paying more, or they may be paying less, upon the market value of their property, than individuals throughout the State or other corporations.

If, therefore, the Legislature had the constitutional right to impose this arbitrary rate of three per cent. upon gross earnings in the year 1865 without considering the question of its relative burden, as compared with other taxes, then it had the same right in 1866 and 1867, and so on, to the end of the chapter.

III.

When we have once advanced to this point in our argument, then there is no logical halting place till we reach the proposition that a perpetual rate can be fixed by contract, and that such a contract will be enforced by this Court.

This subject has been so often examined and re-examined by this Court that it would seem to be quite unnecessary to call the attention of the Court to any of the cases, were it not that the principles established by the decisions seem to be called in question in this case by our adversaries. They at least dispute the logical consequences flowing from those decisions.

It may not, therefore, be out of place for us to briefly recapitulate what we understand to be the result of the decisions in this Court. We understand it to have been uniformly held that, in the absence of constitutional restriction, the power of the Legislature of a State on the subject of taxation is practically absolute. We understand it also to have been uniformly held that the right of a State Legislature to bind the State by contract on the subject of taxation is coextensive with its power to legislate on the subject. Thus, if the Legislature has the right, as it undoubtedly has in the absence of constitutional prohibition, to make exemptions from taxation, or to select the class of persons or the kinds of property which shall bear the burden of taxation, then the Legislature has the right to contract with a corporation on a valid consideration for exemption from taxation, or for a particular method and rate of taxation. So, if a State Legislature has the right under its constitution, as the Legislature of Minnesota has been uniformly held to have, to commute the taxes of a railroad by imposing a tax upon gross earnings instead of a direct tax upon its property, then it may contract with the Railroad Company for that particular mode of taxation, and if it may so con-

tract for a year it may so contract in perpetuity and may fix the rate in perpetuity. We also understand it to have been held uniformly by this Court that while the presumption is against the making of a contract divesting subsequent Legislatures of the power to impose a tax upon a particular corporation or to change the rate of taxation of a particular corporation, yet, where the contract binds the Company perpetually, it will be held likewise to bind the State perpetually.

Without going back to the earlier cases in this Court, where these principles were first announced in spite of vigorous and earnest opposition from learned counsel, it is sufficient to call the attention of the Court to some of the later cases where the subject has been fully re-examined and the time-honored doctrines of this Court clearly reaffirmed.

The case of *New Jersey vs. Yard*, 95 U. S., 104, is a direct authority for the proposition that, where a tax of a fixed percentage was imposed upon a Railroad Company, and it was declared in the Act that such tax "shall be in lieu and satisfaction of all other taxation or impositions whatsoever by or under authority of this State, or any law thereof," and where the Act had been accepted by the Railroad Company (as were the Acts involved in the case at bar), and where the Company had proceeded to build a portion of its road and to operate the same on the faith thereof, there was a contract binding upon both parties, and as the Railroad Company was bound to pay the percentage continuously, so, on the other hand, the State was bound to accept the percentage in lieu and satisfaction of all other taxation continuously, and that there was no right on the part of the State to revoke the contract. The opinion in the case just cited was delivered by Mr. Justice MILLER.

In the case of *Farrington vs. Tennessee*, 95 U. S., 679, this whole subject was very fully re-examined by Mr. Justice SWAYNE, notwithstanding that he says, in his opinion at page 681, "the ground of the discussion

has been well trodden by our predecessors. Little is left for us but to apply the work of their minds." The case arose under a Charter of a Bank which provided that the Bank should pay to the State an annual tax of one-half of one per cent. on each share of stock "which shall be in lieu of all other taxes." The Court held that this was a perpetual contract, binding on both parties, although there were no words in the contract expressly making it perpetual. The Court reviews the cases theretofore decided on the subject of contracts by the Sovereign and holds in the case before the Court that there was a binding and valid contract.

In the case of *Pearsall vs. Great Northern Railway Company*, 161 U. S., 646, Mr. Justice BROWN again elaborately reviews the authorities on this general subject and says at page 662:

> "This Court has had perhaps more frequent
> "occasion to assert the inviolability of corporate
> "charters in cases respecting the power of taxa-
> "tion than in any other, and in a long series of
> "decisions has held that a clause imposing cer-
> "tain taxes in lieu of all other taxes, or of all
> "taxation to which the Company or stockholders
> "thereof would be subject, is impaired by legis-
> "lature raising the rate of taxation or imposing
> "taxes other than those specified in the Charter."

The foregoing citations are selected merely by way of example from the innumerable cases in this Court upon the subject.

IV.

The entire body of existing railroad legislation in the State of Minnesota must be taken into consideration as a whole in passing upon the question of the uniformity of this system of railroad taxation.

We understand the fact to be that, taking into view the various statutes passed from time to time by the Legislature of the Territory and of the State of Minnesota, the rate of taxation will be found to be substantially uniform as to all railroads. With a very few and trifling exceptions, we understand that all the railroad corporations in the State of Minnesota are taxed at the rate of three per cent. on their earnings. There are some who are still paying a lower rate on the one and two per cent. basis, not yet having reached the stage when the three per cent. rate applies; but practically all the railroads in the State are taxable on the three per cent. basis when they have passed or shall hereafter pass beyond the earlier years of their existence. We have thus a practical uniformity, which is in effect the same as if there were a general law embracing all railroads in one Act and providing for this mode of taxation and for this particular rate.

V.

The decisions in the various States, having similar provisions to those of the Minnesota Constitution, clearly establish the right of the Legislature to treat a railroad system as an indivisible entity for purposes of taxation and to apply to a railroad system a different mode of valuation and a different method of taxation from that applied to other corporations or to individuals.

The Constitutton of 1870 of the State of Tennessee is very much stricter than the Constitution of Minnesota in its requirements as to taxation. Art. II., Section 28, provides : " *All property*, real, personal, or mixed, *shall be taxed*." Certain exceptions are then provided for, which do not include railroad property. " All property shall be taxed *according to its value*, that value to be ascertained in such manner as the legislature shall direct, so that *taxes shall be equal and uniform* throughout the state. *No one species of property* from which a tax may be collected *shall be taxed higher than any other species of property* of the same value."

Under these stringent provisions, it was held by the Courts of Tennessee and their ruling was affirmed by this Court in the *Gaines* case (97 U. S., 697), that the taxation of a railroad company by imposing a tax of a percentage of gross earnings was a violation of the constitutional mandate, because it " did not impose a tax upon the property of railroad companies equal and uniform with that imposed upon the property of individuals."

This construction of the Tennessee Constitution differs radically from the decisions of the Supreme Court of Minnesota construing the Minnesota Constitution and the decision of this Court in the *Alford* case construing the Organic Act of Dakota.

Yet even in Tennessee, under these stringent provisions of the Constitution of 1870, thus narrowly construed by the Courts of Tennessee, it has been *held* that a County assessment of a railroad for taxation by estimating the value of the whole road in the State and out of it, including rolling stock, equipments and buildings, and then taking the average value per mile, and multiplying by the number of miles in the County, is not unconstitutional, and that a railroad is to be estimated according to its value as a railway.

Louisville & Nashville R. R,, Co. vs. The State of Tennessee, 8 Heiskell, 664.

The Court say at page 797: "A railroad, with its necessary fixtures and appliances, is real estate, and taxable as such, and must be taxed upon its value as a railroad, and *that value must be ascertained by its* actual, and not its speculative, *profits*, or its mere capacity for productiveness, as it must be taxed at its value when assessed, and not what might be its value if under better management."

And again, at page 803: "In this case the plaintiff's property has been assessed on its actual value, as railroad property, upon a valuation of its entire roadbed, rolling stock, equipments, engine houses, machine shops, depot grounds and lands, in view of the special uses and purposes to which they were all put and applied and the *profits arising from them as a railroad and appurtenances.*"

The Court held the assessment to be "lawful and proper."

This case was decided in 1875, and involved the validity of the assessment of 1874.

The language of Section 3 of Article IX. of the Minnesota Constitution is copied from that of Section 2 of Article XII. of the Constitution of Ohio (adopted in 1851), which reads: "Laws shall be passed taxing *by a uniform rule*, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise and also all real and personal property, according to its true value in money."

The words "by a uniform rule" are omitted in the Minnesota Constitution. The other language above quoted appears in the section of the Minnesota Constitution above referred to.

Notwithstanding this provision for taxing real and personal property "according to its true value in money" and for taxing by a "uniform rule," the Courts of Ohio have held that "the property of a corporation may be regarded, in the aggregate, as a unit, an entirety, as a plant designed for a specific object;

and its value may be estimated not in parts, but taken as a whole."

State vs Jones, 51 Ohio St., 492, 511.

Accordingly, the constitutionality of the so-called "Nichols Law" was upheld, which taxed express companies under a valuation to be made by a State board and apportioned among the several counties of the State, not in proportion to the property of the companies in the several counties, but "in the proportion that the *gross receipts* of the business of said express companies in the places where they transact business, bear to the *entire gross receipts in this State* of said express companies."

The Court say (at p. 505): "Taxation by a uniform rule does not necessarily demand that there should be the same mode of assessment for every species of property, without regard to any classification."

The Court cites (at p. 507), with approval, *Wagoner vs. Loomis*, 37 Ohio St., 571, in which case "it was urged in argument that because a method of return, and mode of valuation, and agency for determining valuation, separate and distinct from that as to individuals, was fixed in reference to banks, the law violated Section 2 of Article XII. of the Constitution. But it was held in that case that statutory provisions whereby different classes of property are listed and valued for taxation in and by *different modes and agencies* are not necessarily in conflict with the provisions of the Constitution which require all property to be taxed by a uniform rule, and according to its true value in money."

The system of railroad taxation in force in Ohio was also approved by the Court in this case of *State vs. Jones.*

See, also, *R. R. Co. vs. Commissioners*, 48 Ohio St., 249, where it is said by the Court at page 251: "The method of taxing railroad companies prescribed by

Section 2774, Revised Statutes, has been in use in this State for more than a quarter of a century, and its validity has not been seriously challenged before."

This section provides that the value of the property of any railroad company, as found and determined by a board (composed of the county auditors of the various counties through which the railroad runs), " shall be apportioned by said board among the several counties through which such road, or any part thereof, runs, * * * in the same proportion that the length of such road in such county bears to the entire length thereof in all such counties." In other words, as summarized by the Court in *R. R. Co. vs. Commissioners*, 48 Ohio St., 251:

> " The section provides that such proportion of the entire property of a railroad (except realty, not necessary to its daily operations) shall be taxed in each district through which it runs, as the length of road in such district bears to its whole length."

The same principle of apportionment, as applied to telegraph and telephone companies by the " Nichols Law," is approved in *State vs. Jones*, 51 Ohio St., 508.

The ruling in the case of *State vs. Jones* was affirmed in this Court so far as questions arising under the Federal Constitution gave this Court jurisdiction in *Adams Express Co. vs Ohio*, 165 U. S., 194; 166 U. S., 185.

VI.

In determining the true meaning and intent of the Constitution of Minnesota, and in determining the true meaning and intent of the statutes passed by the Legislature of Minnesota, and in determining the force

and effect of the contracts which the State undertook to make with the Railroad Companies, the Court must take into consideration the situation of affairs in the State at the time when the Constitution was adopted and at the times when these contracts were entered into, and must determine these questions by the situation as it then existed and not by the situation as it now exists.

As was said very forcibly by this Court in the case of *Mobile & Ohio Railroad vs. Tennessee*, 153 U. S., 502 :

> " In *Preston vs. Browder*, 1 Wheat., 115, 120, it was said that in the construction of the statutory laws of a State it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of many of the provisions in them. The same general rule is stated in *United States vs. Union Pacific Railroad*, 91 U. S., 72, 80, 81, and in *Platt v. Union Pacific Railroad*, 99 U. S., 48, 64, where it was applied in construing certain sections of the act of Congress, approved July 1, 1862, incorporating and granting lands to the Union Pacific Railroad Company. So in *Winona & St. Peter Railroad v. Barney*, 113 U. S., 618.
>
> " Legislative contracts, especially, should be read in the light of the public policy entertained and the purposes sought to be accomplished *at the time they were made*, rather than at a later period when different ideas and theories may prevail. In *Platt v. Union Pacific Railroad* Mr. Justice STRONG expresses this proposition as follows : ' There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. * * * But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves

in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.' "

The situation of the people of the State of Minnesota at the time when their Constitution was adopted and the policy of the State, which led to the passage of the statutes in question in this case, appear clearly from the language of the Supreme Court of Minnesota used in the *Parcher* case and in the *Luther* case, quotations from which are made in the briefs of our associate and ourselves heretofore filed with this Court. At the time of the adoption of the Constitution the State was absolutely without a mile of railroad. Its only highway for commerce by steam, or otherwise than by horse power, was the Mississippi River, which was navigable only to St. Paul and was not navigable at all for a large portion of the year on account of the severe northern winter which set in early and lasted late and which made the river impracticable for navigation. There was no access whatever to Lake Superior from St. Paul except by stage, or wagon, or on horseback, through a wilderness. There was but a fringe of civilization in the State and a vast uninhabited and undeveloped territory waiting to be reclaimed from the wild beasts and the savages. Under these circumstances the last thing that entered into the minds of the men who framed the Constitution of Minnesota was to so tie the hands of their Legislature as to prevent them from granting inducements to Railroad enterprises which might open up and develop the great resources of the State. On the contrary, their desire was to leave the path open to the future legislatures of the State to hold out all proper inducements to investors willing to take the risk of laying out new railroads through the wilderness, waiting for their dividends until they should have developed the territory through which their railroads were to

run, and to which they were to bring the inhabitants from whom, and from whom alone, their future profits were to come.

The framers of the Constitution knew, of course, of the system of land grants that was then in existence under Acts of Congress and Acts of the Territorial Legislature ; they knew, of course, of the numerous statutes that had been passed by the Legislature of the Territory providing for a tax on gross earnings in lieu of all other taxes. Had they intended that such legislation should cease in the future and that the Legislature of the new State should be shorn of the powers which had been exercised by the Legislature of the Territory in these respects, they would have made the matter too clear for discussion. So far from doing this, they left the matter, to say the least, open to debate, and no one seems to have suspected at the time that any restriction was intended to be put upon the State Legislature in the matter of commuted taxation for railroads in the State. The Legislature, as we have already pointed out, repeatedly went on making new grants of land and enacting new provisions for commuted taxation.

To now apply to the construction of the Constitution a different policy called for by a different situation now that the land grants have become valuable by reason of the building of the Railroads, and when the State is no longer clamoring for the building of railroads, but is seeking to charge the railroads with new burdens, would, we submit, be not only an act of injustice, but would be a violation of all true principles of construction applicable to written instruments, whether constitutions, statutes or contracts. All such instruments are to be construed as the parties themselves would have construed them at the time when they were written.

An act passed by the first legislature after the adoption of the Constitution is a contemporary interpretation of the latter entitled to much weight.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

A contemporary construction of the Constitution acquiesced in and practiced for a period of years fixes the construction, and the court will not shake or control it.

Stuart vs. Laird, 1 Cranch., 299.
Britton vs. Ferry, 14 Mich., 66.

The practical construction given by the legislature to a constitutional provision, for many years acquiesced in and acted upon unquestioned by the executive and administrative departments of the government, is entitled to controlling weight in its interpretation.

People ex rel. Williams vs. Dayton, 55 N. Y., 367, 378.
Hassan vs. City of Rochester, 67 N. Y., 529, 535.

That a practical exposition of the Constitution long acquisced in will not be departed from, see.

1 Story on the Constitution (5th Ed. Bigelow), § 408, n. *(a)*, and cases cited.

In *Ogden vs. Saunders*, 12 Wheaton, 290, this Court said, per Mr. Justice JOHNSON:

> " When considering the first question in this cause, I took occasion to remark on the evidence of contemporaneous exposition, deducible from well-known facts. Every candid mind will admit, that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption, that the contemporaries of the constitution have claims to our deference, on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people, when it was adopted by them."

This principle was applied by this Court in the case just cited in arriving at the conclusion that the power

of Congress to establish uniform laws on the supject of bankruptcy did not exclude the right of the States to legislate on the same subject, except when the power is actually exercised by Congress and when the State laws conflict with those of Congress.

VII.

The constitutional amendment of 1871, which the Supreme Court of Minnesota holds to be a "ratification" of the system of commuted taxation of railroads then in use, should more properly be described as a "recognition" rather than a "ratification" of that system.

If the framers of the amendment in question had considered the constitutionality of the legislation then existing as doubtful, and had desired to remove the doubt, they would have certainly used different language from that which they did use They would certainly have provided explicitly that any law theretofore or thereafter enacted providing that any railroad company should, in lieu of all other taxes and assessments, pay into the Treasury a percentage of gross earnings, should be deemed to be valid and constitutional, and that no such law theretofore passed or thereafter passed should be repealed or amended, except with the consent of a majority of the electors voting thereon. There is, however, no such language, nor anything approaching to it, in the amendment. There is nothing to suggest that anybody had ever had any doubt about the validity of the existing legislation. The language is purely negative. It assumes that the laws theretofore passed were properly passed and were existing laws, and it places a restriction upon their repeal or amendment.

No one reading this amendment for the first time would suspect that the laws theretofore passed were considered by anybody to be in conflict with the Constitution of the State and to be null and void. Indeed, to speak of the "repeal or amendment" of any law or laws theretofore enacted, if such law or laws were then void by reason of the constitutional inhibitions upon the powers of the Legislature, is to use language which amounts to a contradiction in terms. How can laws be repealed or amended if they do not exist, and how can they exist if they be unconstitutional *ab initio?*

We respectfully submit that this constitutional amendment is a declaration by the People of the State of Minnesota, in the nature of a construction of their own Constitution and in the nature of a declaration that all the existing legislation of that character was and had always been constitutional. In this sense it is a "ratification;" but, as we have already said, it is more properly a "recognition" or "declaratory affirmation" of the validity of existing legislation. It is thus a "ratification" or "recognition" or "affirmation" of the Statutes *in toto*, and not as declared by the Supreme Court of Minnesota in the case at bar, only partial and subject to the limitations of the right of the Legislature and of the voters to repeal or amend without the consent of the railroad companies.

WM. B. HORNBLOWER,
Of Counsel for Plaintiff in Error.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1899.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, on Relation of James N. Marr,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

The following provisions have always stood in the Constitution of the State of Minnesota:

All taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the State. Article IX, Section 1.

Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money; but public burying grounds, pub-

lic school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation. Id., Sec. 3.

Prior to 1871 the legislature of said State made certain grants to aid in the construction of railroads, wherein it was provided in substance that the respective grantees should pay into the state treasury annually, in lieu of the ordinary form of taxation, certain percentages, usually three per cent upon their gross earnings. The grants in question were made by special acts of the legislature, and are hereinafter set forth with sufficient fullness to indicate their purport.

With reference to the several railroad companies interested the several acts may be appropriately classified as follows:

1. *The St. Paul & Duluth Railroad Company.*

The act of May 23, 1857, by which the above named company was organized under the name of the Nebraska & Lake Superior Railroad Company, contained no provision relative to taxation.

By an act of the legislature of said State approved Feb. 23, 1865, (S. L. 1865, c. 2), accepting a grant from the United States and transferring the same to the predecessor of the present St. Paul & Duluth Railroad Company, it was provided as follows:

"That in consideration of the lands granted by this act, and of the lands, rights, privileges and franchises which have heretofore been granted to said railroad company, the said company shall, on or before the first day of March of each and every year, after said railroad is completed and in operation, pay into the treasury of the State three per cent on the gross earnings of said railroad, which sum shall be in lieu and in full of all taxation and assessment upon said railroad, its appurtenances and appendages, and all other property of said company, real, personal or mixed, including the lands hereby and heretofore granted to said company, or so intended to be granted. Provided, however, that the lands hereby and heretofore granted to said company shall be subject, like lands of individuals, to be taxed as fast as the same are sold or conveyed, or contracted to be sold, or are leased by said company, or the stumpage upon any lands is sold or contracted to be sold by said company," etc.

Eight days later, by an act approved March 3, 1865, (S. L. 1865, c. 81), the legislature of that State modified the terms of the last named act by providing, so far as material, as follows:

"Provided that said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year, pay into the treasury of the State one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after thirty

> miles of said railroad shall be completed and in operation; and shall during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this State, on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad; and shall, from and after the expiration of said seven years, on or before the first day of March of each and every year, pay into the treasury of this State, three per cent on the gross earnings of said railroad; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessment whatever."

The St. Paul & Duluth Railroad Company is the successor by foreclosure proceedings to the company above named, and acquired in virtue of General Laws Minnesota, 1876, Chapter 30, "all and singular the same rights, powers, privileges, immunities and advantages" enjoyed by its predecessor.

2. *Northern Pacific Railroad Company.*

This company received its land grant direct from the Federal Government by an act of Congress approved July 2, 1864, which, in addition to making the grant, created the corporation. For manifest reason it was silent upon the subject of taxation. Section eighteen thereof is as follows:

> "And be it further enacted that said Northern Pacific Railroad Company shall obtain the consent of the legislature of any state through which any portion of said railroad line may pass, previous to

commencing the construction thereof; but said company may have the right to put on engineers and survey the route before obtaining the consent of the legislature."

The consent of the state therein required was given by an act of the legislature, approved March 2, 1865.

The first law enacted especially providing for the taxation of the Northern Pacific Company was enacted in 1870, and provided that the lands, franchises, property, etc., of the company should be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and should be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property, etc., of the Lake Superior & Mississippi Railroad Company, now the St. Paul & Duluth Company.

3. *The Minneapolis & St. Cloud Railroad Company.*

The initial act of incorporation of this company was approved March 1, 1856 (S. L. 1856, c. 150), which contained no provision as to taxation of its property. The act was amended February 23, 1864, but the amendatory act was also silent upon the subject. (S. L. 1864, c. 5).

This company received its grant by an act approved February 11, 1865 (S. L. 1865, c. 3). The granting act was also silent on the subject of taxation.

An act was approved February 28th of the same year, amending the original incorporation act and repealing certain provisions of the act of 1864, but making no reference to the subject of taxation.

An act was approved March 5, 1869, which was also silent as to taxation. (S. L. 1869, c. 53.)

The act which prescribes the method of taxation of this property was approved March 3, 1870, section one of which, so far as material, is as follows: (S. L. 1870, c. 52.)

> "That in consideration of an annual payment of a per centum upon the gross earnings of the Minneapolis & St. Cloud Railroad, as herein provided, the road, its appurtenances and appendages, and all other property, estate and effects of the Minneapolis & St. Cloud Railroad Company which they have already acquired, or which they may hereafter acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all assessments and taxation, etc. * * * And the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessment whatever."

In 1871 the people of said state adopted an amendment to their Constitution in form as follows:

> "Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state or operating its railroad therein, or which may be hereafter organized, shall, in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain per centum therein mentioned of thegross earn-

ings of the railroad companies now existing, or hereafter organized, shall, before the same shall take effect and be in force, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."

Const. Minn., Art. IV, Sec. 32a.

Pursuant to the said amendment of 1871 the legislature of said state submitted to the voters thereof, at a general election held therein in the month of November, 1896, for their approval or rejection, the statute enacted in 1895, providing for the taxation by the ordinary method of all lands granted to railroad companies. The statute so submitted was adopted, the first three sections of which are as follows:

"Sec. 1. All lands in this state heretofore or hereafter granted by the State of Minnesota or the United States, or the Territory of Minnesota, to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used or occupied for rights-of-way, gravel pits, side-tracks, depots, and all buildings and structures which are necessarily used in the actual management and operation of the railroad of said companies; provided, that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as is now provided by law, and that nothing in this act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands.

"Sec. 2. Such portion or portions of any act or acts, general or special, of the State or Territory of Minnesota, heretofore enacted, which provides or attempts to provide for any exemption of the lands hereby declared taxable from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

"Sec. 3. If this act shall be held to be void, so far as it applies to the lands of any particular railroad company in this state, it shall not be ground for declaring it void of any application to any other company not similarly situated."

Laws Minn, 1897, p. X.

Pursuant to the passage and popular approval of said act of 1895, the county auditor of the County of Aitkin in said State, was proceeded against by the defendant in error, who sought to compel him by writ of mandamus to place upon the tax lists of his county for the purpose of taxation, the several tracts of land the tax whereon is now in controversey.

The Supreme Court of Minnesota decided, by its decision rendered in 1898 (see record) that the said tracts are taxable by reason of the passage and approval of said statute of 1895.

Reported, 72 Minn. 200.

The plaintiff in error resists the taxation of said several tracts under the said statute, on the ground that by reason of the terms of the several granting acts above referred to the respective railroad companies thus acquired contract rights which are inviolable under the Constitution of the United States.

ARGUMENT.

I.

It was not in the power of the legislature of Minnesota to enter into a contract with either of the respective railroad companies, whereby it would be relieved of its just proportion of taxation for state and local government.

The above proposition is based on the legal effect of Article IX, Sections 1 and 2, of the Constitution above cited.

That the several special acts relied on by the respective companies did not create contract rights, and that that was the common understanding of the people of the State as well as of the companies themselves, is abundantly demonstrated by the constitutional amendment of 1871, above quoted; that that amendment was inspired by the officers and agents of the compannies interested, is clearly presumable. This court has heretofore observed that corporate charters emanate from such sources. If this is a just inference, it naturally follows that the companies sought the adoption of the amendment for the reason that they then understood that they had not acquired contract rights. It is plainly obvious that if the companies stand upon the amendment of 1871 as the ratification of unconstitutional statutes, they must accept that amendment as an entirety and subject to all it signifies or implies.

As pointed out by the Supreme Court of Minnesota in the case of *State v. Luther*, 56 Minn. 156, that amendment performed a two-fold purpose, namely (1) it validated pre-existing laws; and (2) it authorized the enactment of commutation laws in the future.

By the very term of the amendment no law past or future, so enacted, could be repealed or modified without popular approval secured in the manner therein provided. But *Pro hac vice* every law so enacted was to be subject to repeal in the constitutional way.

The Supreme Court of Minnesota in its opinion in this cause declared the said special laws unconstitutional. It there said:

> "We place our decision that the statutes under which the railroad companies claim did not constitute irrevocable contracts between them and the state that their lands should never be taxed as other land is taxed by the state, upon the broad ground that when the statutes were enacted they were unconstitutional. Such statutes were in violation of Article IX, Sections 1-3 of the Constitution (of Minnesota)"
>
> *State ex rel v. Stearns*, 72 Minn., at p. 200.

In concluding its opinion that court employed the following language:

> "We hold that the statutes under which it is claimed that the lands in question are exempt from taxation in the ordinary way, upon the basis of their cash valuation, were unconstitutional when enacted, and remained so until validated by the constitutional amendment of 1871. The legal effect of such amendment was to validate them. *State v. Luther*, 56 Minn. 156. But this ratification or validation of the statutes was a qualified one and the right to repeal or amend them was reserved by necessary implication, provided such repeal or

> amendment was adopted and ratified by a majority of the electors. Our conclusion is that chapter 168, Laws 1895, does not impair the obligation of any contract between the state and railway companies, and that the lands here in question are taxable in the ordinary way, as other lands are taxable."

Keeping in mind then that the statutes were, so far as they provided for the commutation system of taxation, invalid, it is irrational to say that any contract rights arose from the adoption of the amendment of 1871.

It was suggested upon argument in the State Supreme Court, and may be here, that there can be no change in the law unless both parties consent to it, but this is clearly a *petitio principii*. It assumes the existence of a contract. It is perhaps unnecessary to remark that there is nothing in the amendment itself which justifies the contention. The Supreme Court of Minnesota did not deem it of sufficient merit to be noticed in its official opinion.

Elsewhere we attempt to show that under the Constitution of Minnesota the legislature of that state has at all times been devoid of the power to grant exemptions from taxation or to enter into a contract with any person or corporation having the effect of an exemption save as is expressly provided in the Constitutional amendment of 1871.

II.

The State Supreme Court having decided that Article IX, Sections 1 and 3 forbade the granting of any immunity from taxation in form provided in the special laws in question, and that they were to that extent unconstitutional, such construction by the state court will be followed by this court, unless clearly wrong.

In support of this proposition we submit the following cases:

Harperding v. Dutch Church, 16 Peters 493.
Ellendorf v. Taylor, 10 Wheat. 153.
Davie v. Briggs, 97 U. S. 628.
Memphis & Charleston R. R. Co. v. Gaines, 97 U. S. 697.
Com. Bank v. Buckingham, 5 How. 317.
Moores v. National Bank, 104 U. S. 625.
Tioga R. R. Co. v. B. & C. P. R. Co., 87 U. S. 137.
Flash v. Conn., 109 U. S. 371.
Stone v. Wisconsin, 94 U. S. 183.
Post v. Kendall, 105 U. S. 669.
Pittsburg C. C. & St. L. R. R. Co. v. Backus, 154 U. S. 421.
Burgiss v. Seligman, 107 U. S. 32.

We are aware that it is a rule of this court to adopt the construction for itself of a state law where contracts have been entered into and rights accrued thereon prior to a construction by the highest state court.

Notwithstanding such rule this court is slow to depart from a construction of a state constitution or statute by

its highest judicial authority, and will not do so unless such construction is manifestly unsound.

In *Burgiss v. Seligman, supra*, it is said:

> "But even in such cases for the sake of harmony and to avoid confusion, a federal court will lean toward an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid any unseemly conflict with the well considered decisions of the state court."

In *Gilman v. City of Sheboygan*, 2 Black, at p. 518, referring to a construction placed upon the constitution of Wisconsin by the Supreme Court of that State, this court say:

> "Acting upon a principle recognized in its demonstration from the earliest period of its history, this court considers itself bound in cases like this to follow the settled opinions of the highest state court giving construction to the constitution and laws of the state."

In *Railroad Companies v. Gaines, supra*, the court say:

> "The decision of the supreme court of the state declaring this section to be invalid so far as it relates to companies not claiming to be exempt from taxation under their charters, because it does not conform to the constitutional requirement of uniformity, is binding upon us as the construction of a state statute by the highest court of a state. While

we are not bound by the decision in the present case that the section is also invalid as to this company after the expiraton of the time to which the exemption of its property was limited by its charter (*Jefferson Branch Bank v. Skelly*, 1 Black 436; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116), the decision ought not to be overruled unless it is clearly wrong. The delicate power which we have under the Constitution of the United States over the judgment of the state courts ought always to be used with the greatest caution."

In *Merchant Bank v. Pennsylvania, supra*, the court say:

"It is sufficient to say in relation to this contention, that the decision of the Supreme Court of the State of Pennsylvania sustaining the statute, is conclusive in this court as to any question of conflict between it and the state constitution." Citing:

West River Co. v. Dix, 6 How. 507.
Beecher v. Cheshire Rd., 125 U. S. 555.
Bell's Gap. Rd. v. Penn., 134 U. S. 232.
Lewis v. Morrison, 151 U. S. 545.
Adams Express Co., supra.
Long Island W. S. Co. v. Brooklyn, supra.

In *Davie v. Briggs, supra*, the court quoting from *Murray v. Baker*, 3 Wheat 551, say:

"An adherence by federal courts to the exposition of the local law as given by the courts of the state, will greatly tend to preserve harmony in the exercise of judicial power in state and federal tribunals."

In *Commercial Bank v. Buckingham, supra,* the Court say:

> "It is the peculiar province and privilege of state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them, under the pretense that their judgments have impaired the obligation of contracts."

In Flash v. Connecticut, supra, a case involving the liability of stockholders of certain corporations, the court say:

> "We think this a case where the construction of the state court is entitled to great if not conclusive weight with us. It is the settled construction of a law of the state upon which the rights and liberties of a large number of its citizens must depend. * * * It is clear that confusion and uncertainty would result should the state and federal courts place different constructions on the sections. Such result ought, if possible, to be avoided. It is true that this decision was made after the defendant had become a stockholder in the Pensacola Lumber Co., but there had been no previous contrary decision."

There would seem to be few, if any cases, where the reason for adopting the construction by a state court of a state statute would appeal with stronger force than in the case at bar. In *Flash v. Connecticut, supra,* the construction of the Supreme Court of Connecticut was followed because the rights and liberties of large numbers of citizens of that state were dependent upon the settled construction of the law. Every property owner and taxpayer

in Minnesota is dependent upon the settled construction of their constitution. If the construction of the state court is sustained by this court, it will mean that the tax payers of counties embracing large areas of granted railroad lands will be taxed by rules of justice and equity, instead of being taxed as at present by most unjust and inequitable rules. It is a hardship which cannot be gainsayed to impose upon the ordinary taxpayers of a county all the burdens of taxation---county, township and school district---when, as is the case in some of said counties, the untaxed railroad lands constitute a large area of such counties. If such consideration may influence this court in applying the rule of observance of the construction made by a state court, the case at bar presents an instance of unusual merit. This court has said:

> "As the whole community is interested in retaining it (the taxing power) undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of a state to abandon it does not appear.
>
> *Piqua Bank v. Knoop*, 16 How. 369.

Two classes of special legislation upon the subject exist, and should be distinctly observed in reading the decision of the Supreme Court of Minnesota, namely, (1) those enacted prior to the adoption of the Constitution in 1858; and (2) those subsequently enacted.

As to the former, the uniform holdings of that court, following the decisions of this court, are to the effect that they constitute contracts, but from the uniform tenor of these decisions it may be safely said that they inferen-

tially repudiate the doctrine that contracts could be created under the constitution of 1858.

Beginning with the early case of *First Division Co. v. Parcher,* 14 Minn. 297, a case which is generally regarded as asserting a most extreme and novel doctrine, we there find the court studiously placing its decision upon the fact that the rights of the company antedated the constitution. By an amendment to the constitution adopted April 15, 1858, the state authorized the issuance of its bonds to aid certain railroad companies in the construction of their respective lines. The amendment provided that the state should have a lien upon the property of the companies, and might upon forfeiture in the payment of the principal or interest, foreclose its lien and purchase the property in its sovereign name. It was further provided that the purchaser, whether the state or an individual, should acquire all the rights, privileges, grants, franchises, immunities and advantages enjoyed by the company so aided. Default was made and the state purchased, and the court thereupon held that the state acquired all the rights, privileges, grants, etc., of the defaulting company, and held them without merger or extinguishment, by virtue of an act passed in 1862, the said rights, privileges, grants, etc., were transferred to the St. Paul & Pacific Railroad Company.

It was contended in that case that the land grant involved in the proceeding became taxable, but the court held that a contract had been acquired under the territorial charter, which survived the foreclosure and passed to the St. Paul & Pacific Company.

In 1877 a case arose in the Supreme Court of Minnesota involving the taxability of a certain banking house. Sec.

4 of Article IX, of the Constitution of that State provided:

> "Laws shall be passed for taxing the notes and bills discounted or purchased, moneys loaned and other property, effects or dues of every description, of all banks and all bankers, so that all property employed in banking shall always be subject to a taxation equal to that imposed on the property of individuals."

This provision was involved in *Commissioners v. Citizens National Bank*, 23 Minn. 280, referring to sections 1, 3 and 4 of Article IX, say:

> "The leading and controlling purpose of these provisions was to subject all property, of every kind and nature, within the jurisdiction of the state, except such as is specially authorized to be exempted, to taxation upon a basis of a cash valuation, and to secure, so far as practicable, absolute equality and uniformity in the apportionment of taxes, so that every piece of property should bear its just and proportionate share of the public burden in the exact ratio of its cash value to that of the entire taxable property of the state."

It further said:

> "As equality in taxation is the constitutional policy of this state, no scheme of taxation can be presumed to have been intended by the legislature, which necessarily involves, in its practical results, the imposition of a greater proportionate share of its burdens upon moneyed capital invested in the business of banking under national laws, than is imposed upon capital similarly employed under state authority."

In *City of St. Paul v. St. P. & S. C. R. R. Co.*, 23 Minn. 469, was presented the question of the taxability of certain property of the defendant, situate in the city of St. Paul. The defendant had acquired the grant from the city in 1857, coupled with an exemption of its land from all taxation, and requiring the annual payment of three per cent. of the gross earnings of its road in lieu of all taxes whatsoever upon the property of the company.

The court say:

> "The line of the railroad in question, together with the lands, property, immunitites and franchises pertaining thereto, is held under a grant made prior to the adoption of the Constitution, and is hence unaffected by any of its provisions relating to the taxing power and the mode in which it shall be exercised. This was fully settled by this court in the analogous case of *First Division St. Paul and Pacific R. R. Co. v. Parcher*, 14 Minn. 297. Upon the renewal of the grant in 1864 to the present company, it was therefore clearly competent for the legislature to change and modify its terms and conditions so as to require the annual payment of a different rate per cent. of the gross earnings of the road to commence upon the completion of thirty instead of fifty miles, and in consideration of such annual payment to exempt the railroad, its appurtenances and other property, from all taxation and from all assessments, both general and local. This modification of the original contract was prohibited by no provision of the constitution; and the enactment of March 4, 1864, in this regard has not

> only been uniformly recognized and acted upon ever since as valid by both the executive and legislative departments of the state government, but by an express constitutional amendment adopted in 1871 it has been placed beyond the reach of any amendment or repeal, *except by a law ratified by a vote of the electors of the state.*"

A case arose in 1891 involving the charter of Hamline University, Minnesota, granted in 1854, wherein it was provided that

> "All corporate property belonging to the institution, both real and personal, is and shall be free from taxation."

It was contended that the legislature of the territory had no power to grant any such special exemption to the University; and that it was not binding upon the future state. It was held, however, that the contentions were untenable, following *First Division Co. v. Parcher, supra.*

> *County of Nobles v. Hamline University,* 46 Minn. 316.

In *State v. Luther,* 56 Minn. 156, is presented a case involving the taxability of granted lands of the St. Paul & Duluth Company, one of the companies whose lands are involved in the suit at bar. The state there contended that such lands were taxable in the ordinary method; but it was adjudged that the gross earnings tax applied to them as well as to the other classes of property employed in the operation of its road.

The court say at page 162:

> "If there is anything in counsel's point, both classes of property must, under the constitution, be

taxed according to its true value in money. The question is one that affects the whole tax system of the state. If all such laws are invalid the consequences would be most serious, affecting the taxation, not only of railroads, but also of mining, insurance, telegraph, telephone and express companies, and the like, most, if not all of which, have been taxed for years on the basis of their receipts or earnings. We do not care to pass upon or consider a question of such great importance until it is necessary, and we do not think that the question arises in this case. *Conceding, without deciding, that tax laws such as we are now considering were invalid when enacted, still we are of opinion that the effect of the constitutional amendment of* 1871 (*Article* 4, *Section* 32*a*) *was to validate all such laws relating to the taxation of railway property.*"

Later on in the decision the court say, referring to the said amendment of 1871:

"This language must have been selected and this amendment adopted with reference to the existing legislation and the general legislative policy to which we have referred; and, read and construed in that light, it amounts to a clear recognition of the validity of existing laws providing for this commuted system of taxation of railroad property and lands, and of legislative power to enact such laws for the future. If it did not refer to this, there was nothing to which it could refer. It is, by necessary implication, a validation of past legislation of that kind, and a grant of power to enact it in

> the future. It is pretty clearly indicated in *City of St. Paul v. St. Paul & S. C. R. Co.*, 23 Minn. 469, and *County of Stevens v. St. Paul, M. & M. Ry. Co.*, 36 Minn. 472, that this was the view then entertained by the court. Within a year and a half after the adoption of this constitutional amendment, the legislature passed a general law (1878 G. S. ch. 11, Sections 128, 129) providing for this system of taxation for any railway company that would accept the provisions of the act; and this system has been universally in vogue down to date, without question as to its validity, until raised in this case."

After the decision in the last cited case had been announced an application for a re-hearing was made. In denying such application the court say:

> "But inasmuch as an *obiter* remark in the opinion might be understood to mean that acts providing for a commuted system of taxing railroad property and granted lands constitute contracts between the state and the railway companies which cannot be repealed or amended, it is proper to say that no such question was before the court and that the remark referred to was not intended to express or intimate any opinion upon that point."

In 1898, another case arose in the Supreme Court of Minnesota involving the constitutionality of a law of that state enacted in 1881, providing for the taxation of mining properties. The same able judge who wrote the opinion in *State v. Luther, supra*, wrote the opinion of the court, and in answer to the question certified by the trial court, namely, "Is the method of taxing mines and mining corpor-

ations, provided by Gen. Laws 1881 (Ex. Sess.) c. 54, constitutional?" gave answer as follows:

> "A comparison of the provisions of the act of 1881 with those of Article IX, Section 1, of the Constitution of the state, will furnish the answer to the first question, namely, for each ton of copper, 50 cents, and for each ton of iron ore mined and shipped, or disposed of, one cent. *It would be difficult to conceive of a system of taxation more obnoxious to the constitution.* We answer the first question in the negative."

The distinction between the case last cited and the Parcher and other analogous cases, is that while it involves the rights of a mining corporation, the other cases had to do with railroad companies. The constitutional amendment of 1871, above referred to, was restricted in scope to railroad companies and was not therefore involved in the said mining case. That case presents the clear cut issue whether the legislature had the authority in 1881 to exempt any company from the payment of its just proportion of the taxes. It is precisely the question which would now be presented by the case at bar with the amendment of 1871 eliminated.

While it cannot be said that the provisions of the Minnesota Constitution in question had been construed by the Supreme Court of that state prior to the dates when the several special laws above referred to were enacted, it is obvious that the doctrine of its courts, the understanding of its legislatures and of its voting population has always been that the special acts in question had no force as valid laws until validated by the amendment to the Constitution in 1871.

Attention should be called to two other recent cases adjudged by the Supreme Court of the State of Minnesota, involving the construction of the provisions of the Constitution of that state above referred to.

State v. Cooley, 62 Minn. 183.

State v. Pioneer Sav. & Loan Co., 63 Minn. 80.

In *State v. Cooley, supra*, the question was whether certain real estate was taxable. By an ordinance of the City of Minneapolis, and a contract made pursuant thereto by the city with the owner, the city gave him a franchise to maintain a market house and place on said premises, to be used exclusively as a public market, for the period of twenty-five years. The ordinance provided that during the said period the entire premises should be exempt from taxation. The relator sought the issuance of a writ of mandamus to compel the county auditor of the county in which said city is situated to place the property on the tax books of the county, and to assess the same. The court, referring to said Sec. 3 of the Minnesota Constitution, say:

> "Clearly, the exemption clause in the constitution was never designed to cover such a case. If it was, the legislature could amend the present statute so as to exempt from taxation street car, water, gas, and electric light companies, and a variety of private enterprises organized and operated for pecuniary gain, but owned by the public in the same general sense, serving the public, and devoted to or used for public purposes, quite as exclusively as is the property in question. *We are sure that an amendment to the tax law through which such an*

exemption was attempted would at once be pronounced unconstitutional."

State v. Poincer Savings & Loan Co., supra, was decided in December, 1895, and involved the validity of a statute providing for the taxation of the property of corporations like the defendant in that case.

The court, citing said sections 1 and 3 of the constitution of that state, say:

> "The provisions of the fundamental law of the state are imperative, and require that taxes shall be uniform and equal, as near as may be, and that all property not exempted by the constitution shall be taxed according to its true value in money. The method of securing these results is left with the legislature, and the mere fact that the statute here in question seeks to take building and loan associations of the class to which the defendant belongs out of the operation of the general tax laws of the state does not make the statute unconstitutional, provided it secures substantial equality of taxation of all of the property held or owned by the class for whose benefit the law was enacted. *But, whatever the method adopted, the legislature cannot, directly or indirectly, exempt any property from taxation which the constitution does not so exempt."*

This is a strong case as it holds to the doctrine that the exemption clause of the constitution of Minnesota is exclusive.

In view of the terms of sections one and three of Article 9 of the Constitution of Minnesota, it cannot justly be said, it would seem, that the legislature was clearly authorized to enter into contracts exempting property from

taxation or with respect to the mode of taxing railroad property, or that the Supreme Court of that state has placed a construction upon the said sections at variance with the contention of the defendant-in-error.

III.

Where a contract is claimed, it must be clearly shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it.

We would emphasize the fact that the plaintiff in error contends for a contract and nothing else. It is not the mere question whether the properties of railroad companies shall be taxed by the one mode or the other, but whether such companies have secured the right to be taxed in a particular way at an invariable rate. If it were merely a question of manner or mode of taxation, the question would be of comparatively slight importance, as substantial equality of taxation might then be attained by raising or lowering the rate as justice should require. But it is the position of the plaintiff-in-error, that during all time, however great the burden of taxation upon the owners of other classes of property, and however unjustly disproportionate to that levied upon other classes of property, the taxes contributed by the railroad companies may be, those companies may successfully resist any increase of taxation by reason of their contracts.

The significance of the attitude of the plaintiff-in-error is all the more obvious when it is remembered that under their pretended contracts they enjoyed perpetual exemption from county and municipal taxation.

The case then clearly justifies the application of that strict rule so often applied by this court, when similar questions have been presented to it.

> "It is manifest that legislation which, it is claimed, relieves any species of property from its due proportion of the general burdens of the government, should be so clear that there can be neither reasonable doubt nor controversy about its terms. The power to tax rests upon necessity, and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment."
>
> *Bailey v. Magwire*, 22 Wall. 217.

> "The contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. When it exists, it is to be rigidly scrutinized and never permitted to extend either in scope or duration beyond what the terms of the concession clearly require. It is in derogation of public right and narrows a trust created for the good of all."
>
> *Tucker v. Ferguson*, 22 Wall. 528.
>
> *Vicksburg R. Co. v. Dennis*, 116 U. S. 668.

> "The power of taxation is an attribute of sovereignty, and is essential to every independent government. Stripped of this power it must perish. Whoever, therefore, claims its surrender must show it in language which will admit of no other reasonable construction. If a doubt arises as to the intent of the legislature, it must be solved in favor of the state."
>
> *Hoge v. Richland & Danville R. R. Co.*, 99 U. S. 348.

See also,

Railroad Companies v. Gaines, 97 U. S. 697.

While this court has long been committed to the doctrine that a legislature unrestrained by constitutional prohibitions may contract away the power of taxation, that doctrine has encountered the strongest dissent from some of its ablest members.

The views of the late Justice Miller, expressed in his dissenting opinion in

Washington University v. Rouse, 8 Wall. at page 443.

are unanswerable, and it is hoped will ultimately become the law of this country. The prevailing doctrine of this court is undoubtedly adhered to because of the view that by its overthrow injustice would result to those who have contracted thereunder. This court said in *Bailey v. Magwire, supra*: "It were better for the interests of the community that this power (of taxation) should on no occasion be surrendered."

We would respectfully submit whether a rule founded in acknowledged injustice to the public, which concedes to a legislature the power to barter away one of the most essential attributes of sovereignty, and which has long been enjoyed by the wealthy at the expense of the poor, should longer be adhered to?

Said the late Justice Miller in the case last referred to:

> "To hold, then, that any one of its annual legislatures can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is

strictly lawful. * * * * * If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hindrance can be seen in the principle adopted by the court, to rich corporations, as railroads and express companies, or rich men making contracts with the legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all burdens of supporting the government. * * * With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies which can never be finally closed by the decisions of the court, and that the one we have considered is of this character. We are strengthened in this view of the subject by the fact that a series of dissents from this doctrine by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defense of our views, we content ourselves with those renewing the protests against a doctrine which we think must be finally abandoned.

"The power of the legislature of a state to exempt particular parcels of property of individuals or of corporations from taxation, not merely of its own existence, but so as to be beyond the control of the taxing power of succeeding legislatures, has been asserted in several cases by this court, although

against this doctrine there have been earnest protests by individual judges."

In the recent case of *Ford v. Delta and Pine Land Co.*, 164 U. S. 666, this court, by Mr. Justice Brewer, took occasion to remark:

> "Indeed, there has been strong judicial dissent from the doctrine of the power of the state legislature to create a permanent exemption from taxation." Citing:
>
> *Washington University v. Rouse, supra.*

IV.

The contention that contracts exist is opposed by the weight of judicial authority, both federal and state.

This court has in a series of cases become committed to the doctrine that under provisions like those of the Minnesota constitution, contracts stipulating away the power of taxation cannot be made.

Welch v. Cook, 97 U. S. 541.
Railroad Cos. v. Gaines, 97 U. S. 697.
Huntington v. Worthen, 120 U. S. 97.

In *Welch v. Cook, supra,* was involved a statute enacted by the legislative assembly of the District of Columbia in 1873, which provides that

> "All property, real and personal, which may hereafter be actually employed within the District of Columbia for manufacturing purposes, shall be exempt from all general taxes for a period of ten

years from date of this act going into effect. Provided, that the property so employed for manufacturing purposes shall not be less than $5,000.00"

By an act of Congress approved June 20, 1874, it was provided:

"That for the support of the government of the District of Columbia, and to maintain the credit thereof for the fiscal year ending June 30, 1875, there shall be levied on all real estate in said District, except that belonging to the United States and the District of Columbia, and that used for educational purposes, the following taxes, etc."

The plaintiff alleged that pursuant to the said act of 1873, he had expended large sums of money in reliance upon the exemption therein provided, and sought to enjoin the collection of taxes under the act of Congress.

It was held, following *Salt Co. v. E. Saginaw,* 13 Wall. 373, that no contract existed.

We cite the case, not because we deem it similar to the case at bar, for it is quite obvious that it was governed by *Salt Co. v. E. Saginaw,* and is not distinguishable from several other of the cases adjudged by this court. We deem it instructive here because of the striking similarity between the language of the repealing act of Congress and said Section 3 of the Constitution of Minnesota, and the construction placed by this court upon the language of that act.

Congress provided that:

"There shall be levied on all real estate in said District, etc., * * * * the following taxes."

The Constitution of Minnesota provides that:

"Laws shall be passed taxing * * * all real

and personal property * * * except, etc."

"We are to presume," say this court, "that Congress knew that as the law stood on the 20th of June, 1874, the property in the District was liable to taxation, with certain exceptions, and that it knew of what such exceptions consisted. We are also to presume that it appreciated the effect of its action when it took upon itself anew and in derogation of the local authorities the duty of fixing the subjects of taxation, and that it knew that the result of declaring all of the property, with certain exceptions, to be liable to the payment of taxes for the year ending June, 1874, was to make that act stand in place of all others upon the subject."

May it not with equal force be presumed that the framers of the Constitution of Minnesota knew that the result of declaring that laws shall be passed taxing all real and personal property, except the enumerated classes, was to make the Constitution stand as a supreme and exclusive rule upon the subject?

The constitutional mandate to the legislature is, You shall not tax public burying grounds, public school houses, public hospitals, etc., but you shall tax every other species of property. It is idle to say that the terms of the constitution are merely directory in purpose, for they are not only mandatory in reason, but likewise so in the very words employed. The language is not that laws may be passed, but that they shall be passed. The legislature might be derelict in its duty, it might disregard the solemn mandate of the constitution, but the duty would nevertheless be ever pressing upon it, losing none of its force by legislative neglect, however long continued.

The rule prescribed to the legislature by the constitution is, as was well said by the Supreme Court of Minnesota, in *State v. Pioneer Savings and Loan Association*, 63 Minn. 80, that "taxes shall be uniform and equal, as near as may be, and that all property not exempted by the constitution shall be taxed according to a uniform rule."

It cannot be successfully urged that a distinction can be drawn between the rights of Mr. Welch and those of the railway companies interested in the case at bar, because he claimed under the general law while they claim under special laws, for this court held in *Salt Co. v. E. Saginaw, supra*, that:

> "Corporations formed under general laws in place of special charters are entitled to the specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters."

In *Railroad Cos. v. Gaines, supra*, was presented a question quite analogous to the one in the case at bar.

The constitution of Tennessee, Art. 2, Sec. 28, contains the following provisions:

> "All property, real, personal or mixed, shall be taxed; but the legislature may except such as may be held by the state, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational. * * * All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct so the taxes shall be equal and uniform throughout the state."

Certain railroad companies whose rights were taxed in that case, claimed exemption from taxation pursuant to an act of the legislature of Tennessee enacted in 1875. This court say:

> "The claim on the part of the company is that by the acceptance of this section as an amendment to its charter, a valid contract was entered into between the state and the corporation, regulating the taxation of the company until the year 1885. It is said that the release by the company of the perpetual exemption of its capital stock and of the exemption of its property until 1877, which were granted by the original charter, was a sufficient consideration for an agreement on the part of the state not to tax the company otherwise than according to the accepted eleventh section for ten years, and that a law which provides for taxation in different manner impairs the obligation of that contract.
>
> "The decision of the supreme court of the state declaring this section to be invalid so far as it relates to companies not claiming to be exempt from taxation under their charters, because it does not conform to the constitutional requirement of uniformity, is binding upon us as a construction of a state statute by the highest court of the state. While we are not bound by the decision in the present case that the section is also invalid as to this company, after the expiration of the time to which the exemption of its property was limited by its charter, * * * *the decision ought not to be overruled unless it is clearly wrong.* The delicate power

> which we have under the constitution of the United States over the judgments of state courts, ought always to be used with the greatest caution. There should be no reversal of such judgments unless the error is manifest."

It will be observed that the Supreme Court of Tennessee construing the statute of that state, not essentially different from that of Minnesota, held that under its terms "no valid contract could be made with a corporation for an exemption from taxation," and that the constitution had "subjected all property in the state to the burden of uniform taxation according to its value."

If the constitution of that state then received a correct interpretation, it would seem to follow with absolute certainty that the legislature of Minnesota could not, between 1858 and 1871, either exempt property from taxation or provide for its taxation except according to a uniform rule. That is to say, it could not adopt an inelastic rule which in the course of time would result in relieving property of its just proportion of taxes. The constitution prescribes a rule from which there is no variance or shadow of turning.

Section 11 of the charter of the Mobile & Ohio Rd. Co., one of the companies whose property rights were involved in that case, provided:

> "That the capital stock of such company shall be forever exempted from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or fixtures which will reduce dividends below eight per cent."

Huntington v. Worthen, supra, is also well in point. The constitution of Arkansas is quite similar in legal effect to that of Minnesota. Its exemption clause is strikingly so. It is true that it contains also the words "all laws exempting property from taxation other than is provided therein, shall be void." Such words are accumulative and precautionary, and do not, it would seem, add to the legal effect of what precedes. The framers of the constitution employed them merely to leave no room for doubt that "all property" save the enumerated classes expressly exempted, should "be taxed according to its value," and the rate of the same should be "equal and uniform throughout the state."

This court, by Mr. Justice Field, say:

> "As thus seen, no part of the property of railroad companies in the state is exempt from taxation, and any law which exempts it is in express terms declared to be void. But laws which indirectly produce such exemption must be equally inoperative. That cannot be accomplished indirectly which the organic law declares shall not be done directly."

In saying that no part of the property of railroad companies is exempt from taxation, Mr. Justice Field must have been speaking with reference to the exemption clause wherein the several classes of exempted property are enumerated. To that fact he couples the other, by way of emphasis, that any law which exempts such property, is in express terms declared to be void. It is obvious that the decision of the court is not rested upon the force of the language declaring such laws void, but upon what precedes.

The contention of the defendant in error is sustained by the weight of state judicial decisions.

Certain propositions are now elementary in the law of taxation, among which are the following:

1. A legislature, in the absence of constitutional restraint, is vested with plenary power over the subject.

2. The rule of equity and uniformity does not preclude the exemption of one or more classes of property, but is satisfied when the tax rests with equal weight upon all the subjects selected for taxation.

An examination of the constitutions of the several states will disclose a wide difference between them as to their respective provisions prescribing the authority of the legislature over the subject.

In many of the states no restraint whatever is placed upon the legislature, while in others the restraint goes no further than to impose a limitation somewhat similar to that expressed in Article 9, Sec. 1, of the Constitution of Minnesota, which enjoins equality and uniformity. The instances are extremely rare where the constitution is substantially similar to Art. 9, Sec. 3, of the Constitution of Minnesota.

When this cause was before the state supreme court the plaintiff in error cited cases arising in the following states:

Wisconsin,	New Jersey,
Iowa,	Pennsylvania,
Kansas,	Mississippi,
Louisiana,	Illinois,
Michigan,	Arkansas.

In order to demonstrate that the cases arising in such states do not meet the contention of the defendant in error, the constitutional provisions involved are for convenience herein reproduced, and are as follows:

Wisconsin.

"The rule of taxation shall be uniform, and taxes shall be levied upon said property *as the legislature shall prescribe.*" Article 8, Sec. 1.

Iowa.

"The general assembly shall not pass local or special laws in the following cases.

* * * * For the assessment and collection of taxes for state, county or road purposes." Article 3, Sec. 30.

Kansas.

"The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least $200 for each family, shall be exempt from taxation." Article 9, Sec. 1.

Louisiana.

"Taxes shall be equal and uniform throughout the state. After the year 1848 all property on which taxes may be levied in this state shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property shall be taxed more than another species of property of equal value on which taxes shall be levied; the legislature shall have the power to levy an income tax, and to tax all persons pursuing any occupation, trade or profession." Title 5, Art. 127.

Michigan.

"The legislature shall provide a uniform rule of taxation except on property paying specific taxes, and taxes shall be levied on such property and shall be prescribed by law." Article 14, Sec. 11.

"All assessments hereafter authorized shall be on property at its cash value." Id. Sec. 12.

New Jersey.

"Property shall be assessed for taxation under general laws and by uniform rules according to its true value." Article 7, Sec. 12.

Pennsylvania.

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may by general laws exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." Article 9, Sec. 1.

"All laws exempting property from taxation, other than the property above enumerated, shall be void." Id. Sec. 2.

Mississippi.

"Taxes shall be uniform and equal throughout the state. Property shall be taxed according to its value. The legislature, however, may impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed

for taxation under general laws and by uniform rules according to its true value, but the legislature may provide for a special mode of valuation and assessments for railroads and railroad and other corporate property, and for particular species of property belonging to persons, corporations or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county." Art. 5, Sec. 112.

Illinois.

"The general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, canvassers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn keepers, grocery keepers, toll bridges and ferries, and persons using and exercising franchises and privileges, in such manner as they shall from time to time direct." Article 9, Sec. 2.

"The property of the state and counties, both real and personal, and such other property as the general assembly may deem necesary for school, railroads and charitable purposes, may be exempted from taxation." Id. Sec. 3.

Arkansas.

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the general assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper. Provided further, that the following property shall be exempt from taxation: public property used exclusively for public purposes; churches, used as such; cemeteries used exclusively as such; school buildings and apparatus, libraries and grounds used exclusively for school purposes, and buildings and grounds and materials used exclusively for public charity." Article 16, Sec. 5.

"All laws exempting property from taxation other than as provided in this constitution shall be void." Sec. 6.

We offer the following suggestions relative to the foregoing constitutional provisions:

1. That in Wisconin it is expressly left to the discretion of the legislature to prescribe taxable property.

2. That in Iowa it is merely a prohibition against the passage of local and special laws upon the subject of taxation.

3. That in Kansas there must be a uniform and equal rate of assessment and taxation, and that certain specified classes shall be exempt. There is no provision, as in Minnesota, *that all property shall be taxed.*

4. That in Louisiana taxes shall be equal and uniform, and that after the year 1848 all property on which taxes may be levied shall be taxed by a proportionate rule.

5. That in Michigan taxes shall be levied on such property *as shall be prescribed by law*. That is, by the legislature.

6. That in New Jersey it is merely required to tax under general laws by uniform and ad valorem rules.

7. That in Pennsylvania there is an express prohibition against the exemption of any class of property save those expressly enumerated.

8. That in Mississippi the constitution does not provide in terms that all property shall be taxed, but merely that taxation shall be uniform, equal and ad valorem. That railroad and other corporate property may be taxed by special mode of valuation and assessment.

9. That in Illinois every person and corporation shall be taxed according to the value of his property. That certain classes, involving those using and exercising franchises and privileges, may be taxed in such manner as the general assembly may from time to time direct; and that certain classes of property may be exempted, and none other.

The cases cited in the court below by the plaintiff-in-error arising under the foregoing constitutional provisions, are the following:

Wis. Central R. R. Co. v. Taylor, 52 Wis. 37.
Trustees v. Iowa, 46 Ia. 275.
R. R. Co. v. Morris, 7 Kan. 210.
Francis v. R. R. Co., 19 Kan. 303.

La. State Lottery Co. v. New Orleans, 24 La. An. 86.
New Orleans v. Kaufman, 29 La. An. 283.
New Orleans v. Davidson, 30 La. An. 554.
New Orleans v. Fourchey, 30 La. An. 910.
People v. Auditor, 7 Mich. 84.
Youngblood v. Sexton, 32 Mich. 406.
State v. Runyon, 41 N. J. Law 98.
Kittanning Coal Co. v. Commonwealth, 79 Pa. St. 100.
Mississippi Mills v. Cook, 56 Miss. 40.
Illinois Cent. R. R. Co. v. McLean, 17, Ill. 291.
Hunsacker v. Wright, 30 Ill. 146.
[illegible] v. Crittenden Co., 19 Ark. 360.
St. Louis R. R. Co. v. Berry, 41 Ark. 509.
Ark. M. R. R. Co. v. Berry, 44 Ark. 17.
Cairo R. R. Co. v. Parks, 32 Ark. 131.
Memphis R. R. Co. v. Berry, 41 Ark. 436.

In Wisconsin it was for a long time held, even under her peculiar constitution, that exemption was precluded. It was so held in

M. & M. R. R. Co. v. Supervisors, 95 Wis. 431.
Weeks v. Milwaukee, 10 Wis. 242.

But a different rule was finally adopted.

W. C. R. R. Co. v. Taylor, *supra*.

The argument upon which the final decision of that court rested tells for the defendant in error in the case at bar, and affords no room for doubt that had the Wisconsin constitution been like that of Minnesota the decision would have been different. At page 63 of the opinion the Court say:

"The import of the provision in the Iowa constitution was the nearest approach to the one adopted in this state, but the phraseology used was very different. The question of prohibiting all exemptions and authorizing certain exemptions was brought prominently before the convention, and after discussion to the effect that the naming of certain exemptions would impliedly prohibit the legislature from granting any others, the convention refused to specifically name the property to be exempted, so an amendment was proposed in these words: 'Sec. 1. All taxes levied in this state shall be uniform and equal, and shall be assessed upon a just valuation of real and personal property.' But the amendment with another section relating to exemptions was voted down. This proposed section so voted down was almost identical with a portion of the section then existing in the constitutions of Tennessee, Arkansas, Louisiana and Texas; but in Texas, Arkansas and Louisiana it had an additional feature.

"The section originally proposed in open convention was 'Sec. 1. All taxes levied in this state shall be as *nearly equal* as may be;' *with another section covering exemptions*, but finally the latter section was stricken out, * * * and the first section was amended by adding the words 'and shall be levied upon such property as the legislature shall prescribe.' * * *

"It would appear from the debates in the convention that some were in favor of binding the legislature firmly both as to taxation and exemptions,

while there were others who favored flexibility as to both. The result was a compromise and the adoption of the unique expression upon the subject found in our fundamental law. Possibly it would have been better for the people at large had the constitution, in addition to a *uniform rule of taxation, required an equality of valuations and assessments, and prohibited all discriminations by provisions similar to those which then existed in some of the constitutions to which we have referred.*"

Criticising one of the earlier decisions of that court holding to a contrary doctrine (*Weeks v. Milwaukee*, 10 Wis. 242), and wherein a remark of the court in *Exchange Bank v. Himes*, 3 Ohio St. 15, that "uniformity in taxation implies equality in the burden of taxation" was approved, the court further say at page 70:

"But the learned justice failed to note that Bartlett, C. J., was construing a section in the Ohio constitution adopted three years after the constitution of this state was adopted, and which, instead of following the language of our constitution, read as follows: 'Laws shall be passed taxing by a uniform rule *all* (the italics are the courts) moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also *all* real and personal property according to its true value in money' except certain exemptions named. And so it appears that Bartlett, C., J., was construing a constitution containing an important provision taken from constitutions which our convention in substance refused to adopt; and hence he said: 'This

provision requires *all property* of every description in the state to be taxed by a *uniform rule* and at its *true value in money*, with the exception of certain enumerated exemptions.' (The italics are in the original.) *Under such a provision there would be no difficulty in holding that all property of every description in the state must be taxed at its true value in money by a uniform rule, and hence the burden of taxation would necessarily be equal.* But the legislature of Wisconsin were never under any such constitutional restriction, and the people in the constitutional convention expressly refused to so limit the legislative power."

Further on the court in support of its decision calls attention to the language of Brewer, J., in *Francis v. A. T. & S. F. R. R. Co.*, 19 Kan. 303, hereinafter quoted.

No such question arose in *Trustees v. State*, *supra*, as in the case at bar. The statute of Iowa provided for the exemption of "all public libraries, grounds and buildings of literary, scientific, benevolent, agricultural, and religious institutions and societies devoted solely to the appropriate objects of these institutions." The main question there decided was whether the residence of a professor of a college, and the residence of a bishop who was rector of a church, were exempt under the said statute. The only other question considered was whether the statute violated Sec. 3, Article 1, of the constitution of that state prohibiting the making of a law respecting an establishment of religion or the free exercise thereof, or compelling one to attend or maintain a place of worship.

It is obvious that the constitution of that state is so radically unlike that of Minnesota that any decision arising

under it would throw little if any light upon the question at bar.

In the case of *M. F. F. S. & G. R. R. Co. v. Morris*, supra, the only constitutional question presented was whether the tax was assessed in a constitutional mode. It appears that railroad property was not assessed by the same officers by whom other property was assessed. The Court in answering the objection say:

> "It will be seen that the counsel for the plaintiff misconstrues the constitution. The constitution does not require that the manner or mode of assessing and taxing property, or the manner and mode of collecting the taxes shall be equal and uniform; but it simply requires that all property shall be assessed and taxed at an equal and uniform rate."

In *Francis v. Railroad Co., supra*, the question was whether a statute was valid which provided for the collection of such taxes on railroad property in the unorganized counties of the state. Inasmuch as all other property in such counties escaped taxation under the then existing laws, it was objected that the statute was void as providing unfair, partial and discriminating taxation. The Court by Brewer, J., at pages 312-314, quotes the constitutional provisions of the several states and observes:

> "In all these provisions will be noticed either an express direction to tax *all* property or an express prohibition on exempting any other than certain specific property. Our constitution contains neither. Does not it mean the same without as those do with. The positive language of these several sections sustains, if it does not compel, the positive assertions of the

> various decisions cited by counsel. Those decisions rest upon the clear commands and prohibitions of the constitution upon which they were based, and are therefore only of limited and qualified application here."

In further justification of the decision in the case last cited the Court say:

> "In a limited sense it may be said that there is a disregard of the obligation of uniformity because there is no attempt to reach all property; but in a higher and better sense it is clear that there is secured an equality and uniformity in the burden of taxation. The spirit is present though the letter may be wanting."

Keeping in mind the language of the constitution of Kansas, the peculiar statute involved, and the additional comment upon the constitutional provisions of other states referred to in the opinion, it is plain that the force of the decision supports the contention of the defendant in error in the case at bar.

In *Louisiana Lottery Co. v. City, supra*, no question of contract was presented, but merely the authority of the legislature to commute the tax of the plaintiff.

In *City of New Orleans v. Kaufman, supra*, was involved an ordinance of the city of New Orleans exacting a license from junk dealers. Held that it did not violate the rule of uniformity or equality.

In *New Orleans v. Davidson, supra*, was involved the question whether the legislature was authorized to exempt certain real and other property.

Reference to the constitutional provisions of Louisiana as sufficient to demonstrate the correctness of the above decisions.

People v. Auditor, and *Youngblood v. Sexton, supra,* were rightly decided in view of the constitution of Michigan, which has not only adopted a rule of uniformity, but declared "taxes shall be levied on such property *as shall be prescribed by law.*

State v. Runyon, supra, was rightly decided under the constitution of New Jersey; yet in truth there was no valid ground for the objection made to the statute. It was a question whether the rule of uniformity had been observed in the taxation of mortgages. How little merit there was to the objection appears from the following excerpt from the decision:

> "The precise objection made by counsel to this law in this respect is that it lacks the quality of uniformity in that it does not subject all mortgages alike to taxation, but leaves the question whether the owner of a mortgage shall submit to taxation on it at the will or caprice of the mortgagee. If regard be had to the substance of the law, and not to mere form, it is apparent that all mortgage interests are in effect made by this act liable to taxation. If the mortgagee chooses to pay that part of the tax which would be represented by the value of the interest of the mortgagee, he may do so. In that event the mortgaged premises are valued without any abatement in valuation because of the mortgage debt. If, on the other hand, the mortgagee is unwilling to pay that part of the taxes which is

> appertainable to the mortgage interest, he may do so by claiming a deduction thereof, and in that event instead of taking a receipt for that portion of the tax as he was permitted to do under the act of 1854, and being allowed the amount on account of the interest of the mortgage debt, he may do so by simply claiming a deduction, and then the tax is laid in form directly upon the mortgage."

Kittanning Coal Co. v. Commonwealth, *supra*, was another case involving only the question of uniformity. The question of the effect of the enumeration of specific exemptions upon the power of the legislature of that state to make additional exemptions, can never arise, because of the effect of Sec. 2, of Article 9, which makes all such attempts void.

In *Miss. Mills v. Cook*, *supra*, it is expressly held that while the legislature may exempt classes of property from taxation, it cannot withdraw property from taxation beyond the reach of legislative recall or influence.

The Court say, at page 54:

> "The true view is that this provision of the constitution fixes beyond legislative act the condition of the property of all corporations for pecuniary profit as being always liable to the exercise of the taxing power, so as to subject it at the will of the legislature to the same taxation as the property of individuals may be subjected to. The legislature may exempt property of a certain class, whether owners be corporations or natural persons, but corporate property shall never be placed beyond the reach of the taxing power. It may not be taxed,

> but it must be ever liable. It need not be 'subjected' but it must always be 'subject' to taxation the same as that of individuals, for the constitution so declares. The provision is *mandatory* as to universal liability to be taxed, but *permissive* to the legislature to tax the property of such corporations or exempt it, as it may see proper, in common with the property of individuals which may be taxed or not for the time being."

In short, under the constitution of that state, the legislature cannot enter into contracts, irrevocable or otherwise, granting away the sovereign right of taxation. This was so in the face of language less stringent than that of Section 3, Article 9, of the constitution of Minnesota.

In *Illinois C. R. R. Co. v. McLean, supra*, the court sustained the gross earnings law. This was based upon the language of the constitution which empowered the general assembly to tax "persons using and exercising franchises and privileges, in such manner as they shall from time to time direct."

But in the later case of *Hunsacker v. Wright, supra*, it was expressly held that while the legislature might commute, it had no power under the constitution to *exempt any person or class of persons from the payment of taxes*, a doctrine which had been announced in earlier decisions, *Trustees v. McConnell*, 12th Ill. 138, and is adhered to in later cases.

Northwestern University v. People, 80 Ill. 333.
Same v. Same, 86 Ill. 141.

The question of contract was not presented or considered in any of the Illinois cases above cited.

Under the constitution of Arkansas the legislature is held authorized to select the classes of property "*subject to taxation.*" In *State v. Crittenden Co.*, 19 Ark. 360, the words "subject to taxation" were italicized. In the case of *Pike v. State*, 5 Ark. 205, the right of exemption was denied, but that decision is overruled by later ones in that state.

The same doctrine is declared by other courts.

Cranford v. Linn Co., 11 Ore. 494.

Railroad Co. v. Miller, 19 W. Va. 408.

Jamesville v. Auditor, 5 Ohio, St. 589.

People v. McCreery, 34 Cal. 432.

Nashville & K. R. R. Co. v. Wilson (Tenn.) 15 S. W. R. 446.

Huntington v. Worthen, 120 U. S. 97.

La. Cotton Mfg. Co. v. City of N. O., 31 La. An., 440.

Rd. Co. v. Gaines, 97 U. S. 697.

State v. Rd. Co., 75 Mo. 208.

(*Hunsacker v. Wright*, 30 Ill. 146, criticized. *Hogg v. Mackay*, 31 Pac. 780.)

The constitution of Oregon provided that "All taxes shall be equal and uniform," and the legislature "shall provide by law for uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property."

In *Hogg v. Mackay* the Court say:

> "The language of the constitution is plain, simple, and easily understood, and manifestly operates as an absolute inhibition against the exemption, either

> directly or indirectly, of any property from taxation except that specially enumerated."

The constitution of Arkansas was construed in *Huntington v. Worthen*, 120 U. S. 97, when this Court, by Justice Field, say:

> "As thus seen, no part of the property of railroad companies in the state is exempt from taxation, and any law which exempts it is in express terms declared to be void. But laws which indirectly produce such exemption must be equally inoperative. That cannot be accomplished indirectly which the organic law declares shall not be done directly."

It adds nothing to the legal force of the constitution that it expressly provides that laws attempting to exempt enumerated classes of property shall be void. Such a clause but serves to emphasize what precedes. This Court say, in the case last cited, that "*No part of the property of railroad companies in the State is exempt from taxation.*" A law is necessarily void which contravenes the constitution.

A reservation in a certain grant of public lands was held unnecessary to effect the reservation and served merely to render more certain what had been granted.

L. etc. R. R. Co. v. United States, 92 U. S. 733.

V.

The second clause of Section 9, specifying the classes of property which may be exempted, is exclusive of any further right of exemption.

A similar question arose in New Hampshire where it was construed that under one provision of the constitution of that State the requisite power had been conferred to provide for the taxation of certain property. But the contention was answered as follows:

> "But if it is claimed * * that the power of taxation is conferred by Article 2 of our constitution, which declares that 'the supreme legislative power in this state shall be vested in the senate and house of representatives, each of which shall have a negative upon the other; * * * it may be urged in reply, that, granting all the power of taxation is conferred by Article 2, it is limited and restricted by the terms of Articles 4 and 5, which follow. Those articles define, with great particularity, the power which may be exercised by the general court, and would seem to confer all the power required by that body to enable it 'to provide for the necessary defence and support of the government, and the protection and preservation of the subjects thereof.' If Articles 4 and 5 were not understood and intended as restrictions and limitations upon the general power conferred by Article 2, it is difficult to understand why they were inserted. They were unnecessary, for they do not enlarge the power of the general court as conferred by Arti-

cle 2, and unless they may be treated as restrictions they are useless. If they are restrictions, it might be suggested that the whole power of taxation is contained in that part of Article 5 which authorizes the levy of proportional and reasonable taxes on all inhabitants and residents of and estates within the state; and that they restrict the power not only to the manner of the levy, but to the subjects upon which it can be exercised, viz., persons and estates."

State v. Express Co., 60 N. H. 241.

It is not uncommon to find a grant in indefinite general terms, limited and explained by a subsequent enumeration of particulars; and when such enumeration is clearly and explicitly made, it must be construed to control the general terms, for otherwise it will be merely idle and nugatory. *Opinion of Justices*, 4 N. H. 565.

In a constitution, the great purpose of which was to define and limit the powers of government, it cannot be supposed that the power to levy and assess taxes would be granted to the legislature without any obligatory restraint on its exercise. No power is capable of greater abuse, or can be made more oppressive and odious in practice. Of this the framers of the constitution and their contemporaries have had abundant experience and knowledge. Nor can we doubt that by the use of words in the constitution the natural import of which is to put a limit on the exercise of this power, they intended them to have that operation and meaning.

Oliver v. Washington Mills, 11 Allen, 268.
Taylor v. Chandler, 56 Tenn. 366.
City of Zanesville v. Auditor, 5 Oh. St. 593.
Fletcher v. Oliver, 25 Ark. 289.

C. & O. R. R. Co. v. Miller, 19 W. Va. 408.
Hogg v. Mackay, 31 Pac. 780.

VI.

Authority to prescribe a form of taxation appropriate to a given business, like a per centum tax upon the gross earnings of a railroad company, does not imply authority to contract away the right of taxation, wholly or in part.

The infirmity of the argument of the plaintiff in error consists in assuming, *first*, the existence of a legislative authority to contract, and, *second*, that the gross earnings method was intended to be a contract, both of which propositions are denied by the defendant in error. Conceding for the purposes of argument only, that under the Minnesota constitution a gross earnings method of taxation is permissible, we contend that, save for the effect of the constitutional amendment of 1871, the legislature is at liberty to change the rate at any time, as justice may require, or to wholly abrogate the method whenever, in its judgment, it shall be deemed advisable. The method adopted does not rest in contract, but springs from legislative power, and may be withdrawn.

Meker v. Ferguson, 22 Wall. 528.
West Wis. Ry. Co. v. Brd of Supervisors, 93 U. S. 595.
Bailey v. Maguire, 22 Wall. 217.
Railway Co. v. Philadelphia, 101 U. S. 529.
Salt Co. v. E. Saginaw, 13 Wall. 375.

R. R. Cos. v. Gaines, 97 U. S. 697.
N. Orleans C. & L. R. Co. v. N. Orleans, 143 U .S. 192.

VII.

Assuming that a gross earnings tax is a legitimate exercise of the taxing power, and that no contract right was acquired by virtue of the special laws in question, it follows that the question is not at all embarrassed by the fact that under the said laws the gross earnings taxes were in lieu of other taxation upon both the granted lands and other property of the railroad companies.

It was clearly within the power of the legislature to subject the granted lands to the ordinary method of taxation. Nor is it material that in the act submitted to and ratified by the people of the State effecting such a change of policy, no reduction was made or authorized in the existing rate. Whether the rate as applied to the property essential to the operation of the railroad be or be not excessive, or unjust, is not a judicial question. All such questions must be addressed to the legislature rather than to the Court.

Nathan v. Louisiana, 8 How. 82.
McCulloch v. Maryland, 4 Wheat. 419.
Providence Bk. v. Billings, 4 Pet. 561.
People v. Flagg, 46 N. Y. 401.
Merriwether v. Garrett, 102 U. S. 472.
Kirtland v. Hotchkiss, 100 U. S. 491.

VIII.

No such trusts inhered in the grants by the acts of Congress as to suspend, or render inapplicable, the operation of Art. 9, Secs. 1 and 3 of the Constitution of Minnesota.

If it be insisted in this Court, as it was in the State Supreme Court, that the State constitution was not intended to prevent the legislature from entering into contracts with the said grantees, we reply that such contention finds no support in the language of the Minnesota constitution. That it was clearly within the power of the legislature to tax such lands in specie as soon as the title therein rested in the respective companies, is elementary. Neither the granting acts, nor the constitution of Minnesota, expressly provide for such exemptions. As to swamp lands, this Court has held that the grants thereof imposed no trusts upon the State.

U. S. v. Louisiana, 127 U. S.

As to the other grants this Court has said:

> "It is a conclusive answer to the propositon we are now considering that the United States have no more claim, legal or equitable, touching the lands here in question, than they have to lands which they have sold and patented to others in the regular course of the administration of the Land Department of the Government; and that Congress has not seen fit, either expressly or by implication, to impose any restriction upon the taxing power of the state. That subject was remitted, as, under the circumstances, it might well be, wholly to their wisdown and discretion."

Tucker v. Ferguson, 22 Wall. 527.

The moment it is held that the Constitution of Minnesota prohibits the exemption from taxation of any other than the enumerated classes of property, nothing remains on which an argument can be founded that granted lands can be excepted from the operation of the constitutional rule. A plain case is then presented for the application of the doctrine that no exemption can be presumed.

N. O. C. R. R. Co. v. New Orleans, 143 U. S. 192.

> "A state cannot strip itself of this most essential power by doubtful words. It cannot, by ambiguous language, be deprived of this highest attribute of sovereignty. This principle is distinctly laid down in each of the cases referred to. It has never been departed from."
>
> *Erie R. R. Co. v. Pennsylvania*, 21 Wall 492.

But this question is fully and completely disposed of in *Tucker v. Ferguson, supra.* It was there, as here, contended that the State, as trustee of the United States, was at liberty to enter into any contract it deemed advisable regardless of the provisions of the State constitution. That contention was strongly pressed upon the consideration of this Court, and was met and overthrown. There the state constitution reserved the right to alter, amend or repeal all laws under which corporations were organized. It will be readily perceived that, so far as the right to act in effectuating the so-called trust, is concerned, the question is the same whether arising under such a constitution or under that of the State of Minnesota. The argument in either case is that the constitution does not apply because the

trust presents a case *sui generis* and not within the contemplation of the constitution.

In *Tucker v. Ferguson*, it was urged by counsel in their brief that the State, as trustee, *had an interest in the lands inconsistent with taxation;* that it could and did enter into an indefeasible contract "that none but specific taxes should be imposed," and that the repeal of the act whereby the contract was made impaired its obligation.

In answer to such contention this Court there said:

> "The State accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might all have been discharged by private individuals. The characters of sovereign and trustee were united in the same party. The State did not in anywise abdicate her sovereignty by accepting the trust, but the former might be exercised to render more effectual the discharge of the latter. She was in nowise fettered, except as she had agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be ultra vires and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further.

> Upon general principles she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing. But when the State, proceeding in the execution of the trust, had transferred her entire title to the company, and they had perfected their title and acquired the right to sell, the case assumed a very different aspect."

If the contention is sound here it must have prevailed there. We submit that the question is foreclosed by the decision in that case.

IX.

Under Article IX, Section 1, of the Constitution of Minnesota, prescribing a rule of equality and uniformity, the Legislature was prohibited from taxing the lands of railroad companies at a less rate, or by any other rule, than that by which similar property of owners was taxed.

The reason which justifies the adoption of a gross earnings tax as to ordinary railroad property, i. e., property which is essential to the operation of the business of a railroad company, repudiates the taxation of land acquired by grant by the same rule.

Even under laws where the property of a railroad company was deemed exempt, the courts, with marked unanimity of opinion, have held that the exemption did not extend to all property of the company regardless of the pur-

poses for which it was held or the uses to which it wes devoted.

State v. Newark, 26 N. J. L. 519.
Cooley on Taxation, 151.
County of Ramsey v. C., M. & St. P. Ry. Co., 33 Minn. 537.
County of St. Louis v. St. P. & D. R. R. Co., 45 Minn. 45.
25 *Amer. & Eng. E. of L.,* 162, note 2, citing numerous cases.

The same strictness of rule obtains against relieving any owner of a given class of property of his just proportion of the tax, even where it is held that the legislature may exempt the class.

Bright v. McCullough, 27 Ind. 223.
Dailey v. Snap, 47 Miss. 387.
Palmer v. Strump, 29 Ind. 329.
People v. Whyler, 41 Cal. 351.
Portland Bank v. Anthorp, 12 Man. 252.
State v. Express Co., 60 N. H. 242.
City of Zanesville v. Auditor, 5 Oh. St. 593.
Loftin v. Citizen's Nat. Bank, 85 Ind. 341.

Such provisions are intended to prohibit discrimination in favor of or against persons and classes, either of persons or of property.

Lehigh Iron Co. v. Lower, 7-81 Pa. St. 482.
Fletcher v. Oliver, 25 Ark. 289.
Primm v. Belleville, 59 Ill. 142.
Youngblood v. Sexton, 32 Mich. 406.
People v. Weaur, 100 U. S. 539.
Ger. Nat. Bank v. Kimball, 103 U. S. 732.

Corporations fall within the purview of such provisions

as well as private individuals and all other subjects of taxation.

Clark v. Mibit, 67 Ala. 217.
Ottawa Gas Light Co. v. Downey, 127 Ill. 201.
Davenport v. Chi. etc. R. Co., 38 Ia. 633.

Conformity to their requirements is an indispensible prerequisite to the validity of a tax imposed in a State when such a provision is in force.

Sleight v. People, 74 Ill. 47.
People v. Henderson, 12 Col. 369.
Northampton v. Hampshire Co., 145 Mass. 108.
State v. Cumberland, etc., R. Co., 40 Md. 22.
Wis Cent. R. Co. v. Taylor, 52 Wis. 37.

Taxes are equal and uniform when all within the limits of the district share equal benefits therefrom, or when they are imposed uniformly upon all property or things of the same description.

Smith v. Aberdeen, 25 Miss. 458.
Palmer v. Stumph, 29 Ind. 329.
Morris v. Waco, 57 Texas 635.
Dyar v. Farmington, 70 Me. 515.

Conclusion.

To summarize the contentions urged on behalf of the defendant in error, we say:

1. That the exemptions claimed on behalf of the several railroad companies whose lands are involved in this suit, are based upon statutes enacted subsequent to the adoption of a constitution by the State in 1858.

2. That that constitution, as held by the Court below, prohibited the legislature from contracting away, wholly or in part, the right to tax the said lands and that they could not lawfully be taxed otherwise than by the rule of uniformity therein provided.

3. That the amendment to the constitution of that State in 1871 operated as a *temporary validation* of the several statutes in question providing for a per centum method of taxation.

4. That such method of taxation was subject to change at any time when effected in the manner provided by the said amendment.

5. That the percentum method of taxation is not a contract at all, but a system of taxation which rests in and derives its force from the sovereign will as expressed in the said amendment.

6. That it necessarily follows from the foregoing postulates, that the lands in question might be brought under the general and ordinary method of taxation, without affecting, so far as this Court is concerned, the question as to the manner in which the remaining properties of the said companies should be taxed, that being a question of purely state policy, the validity of which must be determined, if at all, in other, than the present, litigation.

7. That the right of exemption must rest upon clear and express provisions of law unembarrassed by any question of doubt, and that doubt is fatal to it.

West Wis. R. Co. v. Board of Supervisors, 93 U. S. 595.

8. That the grants to the State by Congress, whether as to swamp or other lands, were not intended to, nor did they, operate to clothe the legislature with the power to stipulate away the sovereign right of taxation as to such lands; for to concede that the power existed to exempt such lands from taxation for any time carries with it the power to so exempt them for all time. There is no halting place between the power to provide for temporary and perpetual exemption.

West Wis. R. R. Co. v. Board of Supervisors, 35 Wis. 267, citing *Washington University v. Rouse*, *supra*.

9. That it is, at best, a harsh doctrine that a legislature can in any case contract away the sovereign power of taxation, and it should therefore be restricted to those cases where the claim rests upon clear and unmistakable terms.

For such reasons, it is respectfully submitted, that the judgment of the State Supreme Court should be affirmed.

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OCT 8 1900
JAMES H. MCKENNEY, CLERK.

Atty. of Douglas, Childs & Merrill

SUPREME COURT

OF THE UNITED STATES.

for D. E. Cree

Filed Oct. 8, 1900.

OCTOBER TERM, 1900.

NO. 20.

FRED STEARNS, AS COUNTY AUDITOR OF AITKIN COUNTY, MINNESOTA,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, ON RELATION OF JAMES N. MARR,

Defendant in Error.

BRIEF ON RE-ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

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SUPREME COURT

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OCTOBER TERM, 1900.

No. 20.

FRED STEARNS,
as County Auditor
of Aitkin County, Minnesota,
Plaintiff in Error,
VERSUS
STATE OF MINNESOTA,
on Relation of James N. Marr,
Defendant in Error.

BRIEF ON RE-ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

The constitution of the State of Minnesota has always contained the following provisions:

> "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash

valuation and be equalized and uniform throughout the state." Art. 9, sec. 1.

"Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, and also all real and personal property, according to its true value in money; but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation." Art. 9, sec. 3.

In 1871 the constitution of Minnesota was amended, by the addition of a section, known as section 32 (a), to article 4 thereof, which is as follows:

"Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state, or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of said railroad companies now existing or hereafter organized, shall, before the same shall take effect or be in force, be submitted to a vote

of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."

Prior to 1871 the State of Minnesota had made grants of public lands to several railroad companies, among which are the grants in question, now claimed to be enjoyed by the following companies:

1. The St. Paul & Duluth Railroad Company.
2. The Northern Pacific Railroad Company.
3. The Minneapolis & St. Cloud Railroad Company.

The grant under which the St. Paul & Duluth Co. now claims, so far as material, is as follows:

"Provided that said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year, pay into the treasury of the state one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after thirty miles of said railroad shall be completed and in operation; and shall, during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this state, on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad; and shall, from and after the expiration of said seven years, on or before the first day of March of each and every year, *pay into*

the treasury of this state three per cent on the gross earnings of said railroad; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessment whatsoever."

(S. L. 1865, Chap. 8, Sec. 1.)

The grant under which the Northern Pacific Co. now claims, so far as material, is as follows:

"That the lands, franchises, property, stock and capital of the Northern Pacific Railroad Company shall be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and shall be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property and franchises of the Lake Superior & Mississippi Railroad Company, as is provided in and by an act entitled 'An act in relation to the taxation of lands granted to the Lake Superior & Mississippi Railroad Company,' approved March 3, 1865; provided, however, that the gross earnings of said railroad company of which a percentage is to be paid to the state, shall include only the earnings of that portion of the Northern Pacific Railroad Company constructed and operated by said company within the limits of this state."

(S. L. 1870, Chap. 65, sec. 1).

The grant to the Lake Superior & Mississippi Railroad Co., referred to in the grant to the Northern Pacific Co., is the one under which the St. Paul & Duluth Co. now claims, the last named company being the successor to the Lake Superior & Mississippi Railroad Co.

The act under which the Great Northern Ry. Co. now claims, as successor to the Minneapolis & St. Cloud Railroad Co., is as follows:

"Section 1. That in consideration of an annual payment of a per centum upon the gross earnings of the Minneapolis and St. Cloud Railroad as herein provided, the road, its appurtenances and appendages, and all other property, estate and effects of the Minneapolis & St. Cloud Railroad Company, which they have already acquired or which they may hereafter acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all assessments and taxation; and in consideration of the grants made to and privileges and franchises conferred upon said company, and of the exemption contained in this section, the said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March of each and every year, pay into the treasury of the state one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next after the said railroad shall be completed and in operation, and shall, during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this state on or before the first day of March of each and every year, two per cent on the gross earnings of said railroad; and shall, from and after the expiration of ten years from the

completion of thirty miles of said railroad, on or before the first day of March of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad. And the payment of such per centum annually as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this state on or before the first day of February in each year, the truth of which abstracts shall be verified by affidavits of the secretary and treasurer of said company; and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstract, full power is hereby vested in the Governor of this state or any other person appointed by law to examine under oath the officers and employes of said company or other persons; and if any person so examined by the Governor or other authorized person, shall knowingly or willingly swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the state the payment of the aforesaid per centum, it is hereby declared that the state shall have a lien upon the railroad of said company and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company.

"Sec. 2. The provisions of the foregoing section are hereby extended to the said Minne-

apolis & St. Cloud Railroad and all its branches."

(S. L. 1870, Chap. 52).

Pursuant to the constitutional amendment of 1871, hereinbefore quoted, the legislature of said state submitted to the voters thereof, at a general election held therein in the month of November, 1896, for their approval or rejection, a statute enacted in 1895, providing for the taxation by the ordinary method of all lands granted to railroad companies. The statute so submitted was adopted, the first three sections of which are as follows:

"Section 1. All lands in this state heretofore or hereafter granted by the state of Minnesota or the United States, or the territory of Minnesota, to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used or occupied for rights-of-way, gravel pits, sidetracks, depots, and all buildings and structures which are necessarily used in the actual management and operation of the railroad of said companies; provided, that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as is now provided by law, and that nothing in this act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands.

"Sec. 2. Such portion or portions of any act or acts, general or special, of the State or Territory of Minnesota, heretofore enacted, which

provides or attempts to provide for any exemption of the lands hereby declared taxable from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

"Sec. 3. If this act shall be held to be void, so far as it applies to the lands of any particular railroad company in this state, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated."

(G. L. 1897, page x).

Pursuant to the passage and popular approval of said act of 1895, the county auditor of the County of Aitkin, in said state, was proceeded against by the relator, James N. Marr, a citizen of that county, who sought to compel him by writ of mandamus to place upon the tax lists of his county, for the purpose of taxation, the several tracts of land the tax whereon is now in controversy.

The Supreme Court of Minnesota decided that the said tracts are taxable by reason of the passage and approval of said statute of 1895.

I.

The doctrine that a state can contract away so essential an attribute of sovereignity as the power of taxation, should be receded from.

We have already, in the brief originally filed on

behalf of the defendant in error, contended for the overthrow of the doctrine that a legislative body can barter away any of the indispensable sovereign powers of a state. It is not our purpose to now enlarge to any considerable extent upon what we have said in our former brief.

With great respect for the opinions of this Court, we deem it our duty to protest against the doctrine which concedes to a legislative body the constitutional right of depriving a state of the power of taxation. We do this with all the more freedom because of the numerous powerful dissenting opinions which have emanated from the members of this Court. The whole doctrine rests upon the unfortunate *obiter dictum* of Chief Justice Marshall in *State of New Jersey vs. Wilson*, 7 Cranch 164. As was long ago pointed out by Mr. Justice Catron, in *State Bank vs. Knoop*, 16 How. 369, in the dissenting opinion filed by him:

> "No question was raised in the Supreme Court of New Jersey, nor decided there or in this court, as to the constitutional question of one legislature having authority to deprive a succeeding one of sovereign power. The question was not considered, nor does it seem to have been thought of in the State Court, or here."

No such question was before the Court in *Gordon's case*, 3 How, 144; see analysis of Mr. Justice Cution in *Piqua Bank Case*, 16 How. at page 400; and in *East Hartford v. East Hartford Bridge Co.*, 10 How. 535, the doctrine was denied in the following language:

> "This case of *Goszler v. the Corporation of Georgetown,* (6 Wheat, 596, 598,) appears to settle the principle that a legislative body cannot part with its powers by any proceeding so as not to be able to continue the exercise of them. It can and should exercise them again and again, as often as the public interests require. * * * Its members are made by the people agents or trustees for them on this subject, and can possess no authority to sell or grant their powers nor the trust to others."

It was said further in the case last cited:

> "The public character of all the parties to this grant, no less than its subject matter, seems, therefore, to show, that nothing in the nature of a contract with terms to be fulfilled or impaired like private stipulations, existed in this case so as to prevent subsequent interference with the matter by the legislature, as the public interests should appear to require."

We regard the doctrine as so obviously unsound, and in its tendency so destructive of government, that neither lapse of time nor repeated judicial recognition of it would ever justify it. We believe that the weight of the argument in all the adjudications of this Court upon the subject has been with the dissenting justices. It was said by this Court in *Bailey v. McGuire,* 22 Wall. 217, that:

> "It were better for the interests of the community that this power(of taxation) should on no occasion be surrendered."

So late as 1873, and in the case of *Minot v. Phil. W. & B. Railroad Co.*, 18 Wall. 206, Mr. Justice Field took occasion to remark:

> "The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this Court has said, the whole communnity is interested in retaining it undiminished, and has 'a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' *Bk. v. Billings*, 4 Pet. 561. If the point were not already adjudged, it would admit of grave consideration whether the legislature of a state can surrender this power and make its action in this respect binding upon its successors, any more than it can surrender its police power or its right to eminent domain."

In *Washington University vs. Rouse*, 8 Wall. 439, Mr. Justice Miller dissenting, being joined in his dissent by Chief Justice Chase and Mr. Justice Field, said:

> "To hold, then, that any one of its annual legislatures can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful. * * If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hinderance can

> be seen in the principle adopted by the court, to rich corporations, as railroads and express companies, or rich men making contracts with the legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all burdens of supporting the government. * * * With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies which can never be finally closed by the decisions of the Court, and that the one we have considered is of this character. We are strengthened in this view of the subject by the fact that a series of dissents from this doctrine by some of our predecessors, shows that it has never received the full assent of this Court; and referring to those dissents for more elaborate defense of our views, we content ourselves with thus renewing the protests against a doctrine which we think must be finally abandoned."

We respectfully submit that the logic of Mr. Justice Miller is unanswerable.

In the recent case of *Ford vs. Delta and Pine Land Co.*, 164 U. S. 666, this court, by Mr. Justice Brewer, took occasion to remark:

> "Indeed, there has been strong judicial dissent from the doctrine of the power of the state legislature to create a permanent exemption from taxation." Citing:
>
> *Washington University vs. Rouse, supra.*

That the state courts quite universally, before the determination of the case of *State of New Jersey vs. Wilson, supra,* had held that the state is without the power, in the absence of constitutional limitations, to contract away the right of taxation, and have since, in many jurisdictions, protested against the doctrine of the Federal cases, is illustrated in the following decisions:

Mott vs. Penn. R. R. Co., 30 Pa. 9.
Merchants & Traders Bank vs. Debolt, 1 Oh. St. 591.
Toledo Bank vs. Bond, Id. 622.
Knoop vs. Piqua Bank, Id. 603.
Brewster vs. Hough, 10 N. H. 138.
Brainerd vs. Colchester, 31 Conn. 407.
E. Saginaw Salt Mfg. Co. vs. E. Saginaw, 19 Mich. 259.
Raleigh, etc., R. R. Co. vs. Reid, 64 N. C. 155.
W. Wisconsin R. R. Co. v. Bd. Supervisors, 35 Wis. 257.

Can there be any doubt that the doctrine is fraught with a danger to the public so great that private interests should not be allowed to weigh against it?

Entertaining these views, we respectfully request a reconsideration of the question by the Court.

II.

While this Court may revise the judgment of the Supreme Court of a state, in-

volving a statute of that state claimed to impair the obligation of a contract, the decision of the state Court will be followed when the question is doubtful, or the decision is not clearly wrong.

This court has always sought to conform its decisions to those of the state Court. It always does so where rights have arisen subsequent to the judicial construction of a state constitution or statute by the state Court. It will follow them, when the question is balanced with doubt.

The question is clearly stated by Mr. Justice Bradley, in *Burgess vs. Seligman,* 107 U. S. 20:

> "The Federal Courts have an independent jurisdiction in the administration of the state laws, co-ordinate with and not subordinate to that of the state Courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of the state constitutions and statutes. Such established rules are always regarded by the Federal

Courts, no less than by the state Courts themselves, as authoritative declarations of what the law is. But where the law has not thus been settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state Courts after such rights have accrued. *But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt.*"

The decision of the state Court will not be overruled unless it is clearly wrong.

"The decision (of the state Court) ought not to be overruled unless it is clearly wrong. The delicate power which we have under the constitution of the United States over the judgments of the state Courts, ought always to be used with the greatest caution. There should be no reversal of such subjects unless the error is manifest."

Memphis & C. R. R. Co., vs. Gaines, 97 U. S. 697.

This Court will follow the state Court when confusion and uncertainty would result from a conflicting construction.

Flash vs. Conn., 109 U. S. 371.

III.

The taxing power of the state is never presumed to be relinquished, and it exists unless the intention to relinquish it is declared in clear and unambiguous terms admitting of no other reasonable construction.

Numerous decisions of this Court support the above doctrine. It was said in *North Mo. R. Co. vs. Maguire*, 20 Wall. 46:

> "Repeated decisions of this Court have held in respect to such corporations, that the taxing power of the state is never presumed to be relinquished, and consequently it exists unless the intention to relinquish it is declared in clear and unambiguous terms."
>
> "The contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. When it exists it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require. It is in derogation of public right, and narrows the trust created for the good of all."

West Wis. R. Co. vs. Supervisors, 93 U. S. 595.

In the application of the foregoing rule it is not merely a question of the phraseology of the alleged contract, but, as in the case at bar, a question of constitutional authority to make the contract. Whatever may be said as to the aptness of the language used in the several statutes now relied upon by the plaintiff in error, it is the contention of the defendant in error that under the constitution of Minnesota the legislature was wholly without authority to contract. In order, therefore, that a contract may be adjudged to exist, it must be made to clearly appear:

1. That the legislature had the power to make the contract.
2. That the legislature intended to make it.

Doubt as to either proposition is fatal to the contention of the plaintiff in error. Whenever it is contended that a state has stripped itself of the power of taxation as to a given subject, the rule is always imperative, as this Court has frequently held, that it must be clearly shown. It was because of the harshness of the doctrine that a state Court can in no case contract away a sovereign power, that this Court has invoked the rule that all public grants are to be strictly construed. For as was said in *Minot vs. Phil. W. & B. R. R. Co.,* 18 Wall. 206:

> "Nothing can be taken against the state by presumption or inference. The established rule of construction in such cases is that rights, privileges and immunities not expressly granted are reserved. There is no safety to the pub-

lic interests in any other rule. *And with special force does the principle upon which the rule rests apply, when the right, privilege or immunity claimed calls for any abridgment of the powers of the government, or any restraint upon their exercise.* The power of taxation is an attribute of sovereignty, and is essential to every independent government. As this Court has said, the whole community is interested in retaining it undiminished, and has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

Where no other question is presented than the construction of a statute, and the terms employed are clear and apt, admitting of no doubt as to their meaning, no occasion arises for the application of the rule. Such is the case of *McHenry vs. Alford*, 168 U. S. 651, cited by counsel for plaintiff in error.

The doctrine of strict construction has been applied to cases analogous to the one at bar.

IV.

The Legislature of Minnesota was without power to enter into a contract exempting railroad companies from taxation, or relieve them from their just share of the burden of taxation, whether as to granted lands, or otherwise.

It is doubtful if there can be found in any other state constitutional provisions which are the exact equivalents of sections one and three of article nine

of the Minnesota constitution, hereinbefore quoted.

Authorities cited in the briefs of counsel for the plaintiff in error will be generally found inapplicable, because of the radical difference between the constitutional provisions involved in those cases and those found in the Minnesota constitution.

Reading together sections one and three of article nine, of the Minnesota constitution, as they manifestly should be, and as the Supreme Court of Minnesota in its decision in this case held they must be read, it is evident that the constitution requires:

1. That all property not expressly exempted from taxation, shall be taxed.

2. That the taxes shall be as nearly equal as may be.

3. That the property taxed shall have a cash valuation.

4. That real property shall be taxed according to its true value in money.

5. That the lands or other property of railroad companies are not and cannot be exempt, save where exemption is based upon a contract antedating the organization of the state government.

Plaintiff in error, notwithstanding the contention of his counsel to the contrary, claims an exemption in fact. Counsel certainly claim a contract whereby the constitutional rule of the State of Minnesota cannot be applied to the taxation of the lands in question; whereby, in consideration of the payment of a percentage upon gross earnings, those lands are to escape taxation. Whether the method be termed taxation or the commutation of taxes, the fact re-

mains that the rate is fixed and unchangeable. The sums annually paid into the state's treasury may be wholly disproportionate to what would be paid by a just method of taxation, yet the state, according to the contention of the plaintiff in error, is powerless to correct the wrong. The fallacy of such contention is the more forcibly seen when the argument is carried to its ultimate analysis. If the legislature had the power to make the contracts in question, it had the power as well to fix the rate at one per cent or one tenth of one per cent, or to forego all taxation and all commutation of taxes. The argument concedes to the legislature the power to contract. If the legislature had the power contended for, it might with equal authority, have stipulated that the lands or other properties of the companies should be taxed at one-half or one-fourth of the value placed upon other property of a similar character. It is exemption, whether it is partial or total immunity. The constitution is offended against in the one case as clearly as in the other.

It is idle, therefore, for counsel to contend, as they do, that they are not claiming exemptions. Conceding, for the purpose of argument only, that a commuted form of taxation is at all permissible under the constitution of Minnesota, the legislature, untrammeled by a contract, could provide for the taxation of railroad property necessary for the carrying on of its business by such system, while its granted lands should be subjected to the ordinary methods of taxation. But the contention of the plaintiff in error is that the legislature in question

has so fettered itself as now to be unable to treat the two classes of property separately for the purpose of taxation. If such method of taxation is permissible, it is merely a question of legislative wisdom or policy as to what method it shall pursue in either case. The constitution contemplates that property shall at all times bear its just proportion of the burdens of taxation. Wherefore, it follows that the legislature was destitute of power to contract for any different rule of taxation.

But it is immaterial whether we regard the record as presenting a case of exemption in a technical sense, or not. It is sufficient to know that the plaintiff in error contends for a contract which deprives the legislature of further power to act. It is a limitation and an abridgment of the power of taxation, so that, within the meaning of the numerous decisions of this Court, the power of taxation has been surrendered, and the rule of strict construction therefore applies. No such question was presented or considered in *McHenry v. Alford, supra,* for the reason that the element of contract did not exist. We contend that that case has no application whatever to the case at bar.

The Supreme Court of Minnesota held that the power to contract had not been conferred upon the legislature. The statutes were declared to be "in violation of Articles 9, Sections 1 and 3, of the Constitution," (Record, p. 68), and the Court further say:

> "If it be conceded that a commuted system of taxation, whereby a percentage on gross

earnings is accepted in lieu of taxation of railway property in specie, might be so adjusted as not to be obnoxious to the constitutional requirement of uniformity and equality of taxation, it is clear that an irrevocable contract, fixing for all future time the rate of taxation on such gross earnings, would not continue to be uniform and equal taxation, because the value of property changes from time to time, and the necessities of the state also change demanding an increased rate of taxation. This is especially true as to town, village, city and county taxes. But uniformity and equality of taxation are not the only mandates of the constitution, for it further commands, that all property on which taxes are to be levied, (that is, all property not exempt from taxation), shall have a cash valuation, and laws shall be passed taxing all real and personal property according to its true value in money.

"The language of the constitution is clear, exact and imperative. It requires that all property not exempt must be taxed, and that the basis of such taxation must be the cash value of the property. As was said by this Court in the case of *Com'r Rice Co. v. Citizens' Nat. Bank,* 23 Minn. 287:

"The leading and controlling purpose of these provisions was to subject all property, of every kind and nature, within the jurisdiction of the state, except such as is specially authorized to be exempted, to taxation upon a basis of a cash valuation, and to secure, so far as practicable, absolute equality and uniformity in the apportionment of taxes, so that every piece of property should bear its just

and proportionate share of the public burden in the exact ratio of its cash value to that of the entire taxable property of the state.'

"It may be true, as claimed, that the gross earnings tax, (if subject to amendment), is only another mode of arriving at equal taxation, and that such a system of commuted taxation of the property of railway companies and similar corporations, is of great practical and material advantage to the state. But the fact remains, that the taxation of all property upon the basis of its cash value was the sole rule ordained by the constitution to secure equality and uniformity of taxation. Thus in *Stinson v. Smith*, 8 Minn. 366, (which arose before the amendement to the constitution, as to assessments for local improvements), it was held that the statute providing for the assessment of the cost of such improvement upon real estate, in proportion to benefits, was unconstitutional, because all property on which taxes are to be levied must have a cash valuation. A commuted system of taxation of mining lands, property and products, by the payment of a tonnage tax on all ore mined and disposed of, in lieu of all other taxes, was held invalid by this Court, because in conflict with Article 9, Section 1, of the Constitution. *State v. Lakeside Land Co.*, 73 N. W. 970."

Plaintiff in error assails the decision of the Supreme Court of Minnesota as not being in accord with its previous decisions. The Court itself said, upon the subject of prior adjudications:

"There is no decision of this Court which holds that statutes of the state providing for

> the payment of a gross earnings tax by railway companies, and exempting their property from taxation in specie upon the basis of a cash valuation, were constitutional, prior to their ratification by the amendment of 1871, Article 9, Section 32(a). There is a clear intimation to the contrary in several cases, notable in those which follow the *Parcher Case,* 14 Minn. 297, sustaining the validity of territorial statutes providing for a gross earnings tax for the old land grant railway companies—that is, those which are organized under charters granted prior to the adoption of the constitution." (Record, p. 69.)

The Court was strictly correct in its statement of fact, as we shall now proceed to show.

The plaintiff in error cites among the earlier adjudications of that Court the following cases:

First Division Co. v. Parcher, 14 Minn. (Gil.) 224.

State v. Winona & St. Peter R. R. Co., 21 Minn. 472.

City of St. Paul v. St. P. & S. C. R. R. Co., 23 Minn. 469.

St. Paul & Chicago Ry. Co. v. McDonald, 34 Minn. 195.

County of Stevens v. St. Paul, M. & M. Ry. Co., 36 Minn. 467.

Com'rs Rice Co. v. Citizens' Nat. Bank, 23 Minn. 280.

We feel justified in saying that not one of the above named cases supports the contention of the plaintiff in error.

1. *The Parcher Case.*

The charter under which the railroad company claimed exemption was granted in 1857.

On April 15, 1858, the Constitution of Minnesota was so amended as to authorize four railroad companies, including the Minnesota and Pacific Railroad Co., to receive the bonds of the state in aid of the construction of their respective lines of railway.

The amendment provided that the company should issue and transfer to the State, as security for its aid, a certain amount of first mortgage bonds of the respective railroads, and their lines and franchises.

It was further provided that in case of default, the governor of the state might require a foreclosure to be made of the security bonds.

By the act of August 12, 1858, passed for the purpose of effectuating the constitutional amendment, it was provided that the purchasers at the foreclosure sale should acquire all and the same rights, privileges, franchises, immunities and advantages enjoyed by the mortgagor company.

By the act of March 6, 1860, being an act supplementary to that of 1858, it was made the duty of the governor to foreclose the mortgage of the Minnesota & Pacific Co. because of its default.

Sale was made, and the state purchased, and the state sold to parties who organized and became possessed of the property.

It was held that the state held and enjoyed, without merger or extinguishment, all of the fran-

chises so acquired by it, including that of taxation.

There is nothing in the case which suggests that under the constitution of 1858 the legislature was authorized to grant an exemption of taxation, nor was Article 9 of the Constitution referred to in the decision of the Court. Furthermore, in the case of *State v. Winona & St. Peter R. R. Co.*, 21 Minn. 315, being the first case arising after the decision in the Parcher case, relative to the state grant, the Court say, at page 317:

> "It is, however, contended by the attorney general that, in the case against Parcher, this Court was not called upon to consider, and did not pass upon the question raised by the constitutional requirement that 'laws shall be passed taxing * * * all real and personal property at its true value in money,' and further that this constitutional provision in effect prohibited and rendered void the transfer, by a law passed after the adoption of the constitution, of the immunity from taxation which was originally conferred upon the Transit Company, and which is now claimed by the Winona & St. Peter Company, as its successor. It is true that this constitutional provision does not appear to be considered in the opinion of this Court in the case referred to. But the consideration and disposition of the point made upon it, is involved in what is said, (on pages 328, 331, of the published opinion), to the effect that it is by *virtue of the amendement to the constitution* that this immunity from taxation, (whether it be regarded as a franchise, or as a right appendant

to the lands to which it related,) was permitted to be made the subject of the mortgage and forfeiture to the state, and was therefore transferrable to the purchaser at the mortgage sale, or to the state under a forfeiture, and also by what is further said in the opinion in reference to the right of the state to hold and transfer whatever it acquired as purchaser at the foreclosure sale, or by virtue of the forfeiture, as property, as a private person might hold and transfer the same, without merger or extinguishment of any of the franchises, rights or immunities possessed by the mortgagors, and which had become the subject of mortgage or forfeiture, under the provisions of the constitutional amendment. In other words, the constitutional amendment, popularly known as the Five Million Loan Amendment, is *controlling* in reference to its subject. It is not a mere act of the legislature, but a part of the organic and fundamental law, of equal authority, *per se*, with any other part of the constitution. Being a particular provision, with reference to a particular subject-matter, it is, within its own sphere, so far as that subject-matter is concerned, paramount and supreme. And it follows that its effect, in permitting the state, by the foreclosure or forfeiture, to acquire, hold and transfer the immunity from taxation, according to the doctrine of the Parcher case, is not controlled or overridden by the general constitutional provision in regard to taxation before quoted."

It thus appears that upon the first action arising subsequent to the decision in the Parcher case, the Court not only admits that Article 9 of the Consti-

tution was not involved, but also asserts that the decision in the Parcher case was rested wholly upon the amendment to the constitution. To say, therefore, that the Parcher case gives any support to the contention of the plaintiff in error, is to wholly misjudge the nature of the decision therein rendered.

2. *State v. Winona & St. Peter Railroad Co.*, 21 Minn. 472.

In this case the railroad company had acquired a grant of lands in 1857, accompanied with a stipulation that the lands should go untaxed until sold and conveyed.

In 1867 the company entered into a contract with one Barney, and others, for the sale and conveyance of the lands so granted. The contract was intended to be in the nature of a trust, with the title remaining in the railroad company. The Court held that the contract amounted to a sale and conveyance within the meaning of the grant, and that the lands became taxable. Counsel in their former brief, at page 16, quote from the decision rendered in the last named case, the following:

> "This is a contract between the state and the company, and whether it is provident or improvident, each must abide by it, according to its true intent."

The grant involved in that case antedated the constitution of 1858. Article 9 of the constitution was not drawn in question, nor in anywise involved

in the case. The question before the Court was purely whether there had been a sale and conveyance within the meaning of the granting act.

3. *City of St. Paul v. St. Paul & Sioux City R. R. Co.*, 23 Minn. 469.

The grant of this company was also acquired in 1857, and contained an exemption clause similar to the one in the Parcher case. It was, indeed, one of the four land grant railroad companies affected by the constitutional amendment of 1858.

The taxing officers of the city of St. Paul undertook to subject a certain lot of the company to an assessment for local taxation. It was conceded on the part of the city that the case was precisely like the Parcher case, with the single exception that in the latter the language exempted the company's property from "all assessments and taxes whatsoever," while in the former the language exempted from "all taxation." The distinction was held to be without merit. In the decision is found this language:

> "The line of railroad in question, together with the lands, property, immunities, and franchises pertaining thereto, is held under a grant made prior to the adoption of the constitution, and is hence unaffected by any of its provisions relating to the taxing power, and the mode in which it shall be exercised. This was fully settled by this Court in the analogous case of *First Div. St. Paul & Pacific R. Co. v. Parcher,* 14 Minn. 297. Upon the renewal of

> the grant, in 1864, to the present company, it was therefore clearly competent for the legislature to change and modify its terms and conditions, so as to require the annual payment of a different rate per cent of the gross earnings of the road, to commence upon the completion of thirty instead of fifty miles, and, in consideration of such annual payment, to exempt the railroad, its appurtenances and other property, from all taxation, and from all assessments, both general and local."

Now, immediately following the language quoted by the plaintiff in error, is the following:

> "This modification of the original contract was prohibited by no provision of the constitution."

In view of the quotations from the language of the decision, made by counsel for the plaintiff in error, touching the power of the state with reference to taxation of railroad companies, we call attention to the following language appearing at page 472, in the case last cited:

> "It is also a part of this well-known history that, in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act *among the four original land-grant companies,* in 1857, the then territory (now state) adopted a distinct and special policy of taxation *in reference to those companies and the lines of road which they were authorized to build,* looking to the early

completion of those lines, and the just rights and interests alike of the companies, the state at large, and all localities therein."

The Court thus clearly emphasizes the fact that the state, on grounds of public policy, had segregated the four railroad companies in question into a class, all of whom were favored by the amendment adopted in 1858, a few months after the adoption of the constitution; and that the only ground upon which the Court sustained modifications in the contracts entered into prior to 1858, was that by force of that amendment to the constitution, it was permissible. The conclusion is irresistible, and is supported by the reasoning of the Court in the last named case, that the *tax could not have been supported except for the provisions of the said constitutional amendment.*

The Court went on to say, in its decision, that the four companies had been treated as a class; that there was no intention to discriminate against either of them upon the subject of taxation, and that the words "all taxation" as used in the charter of the St. Paul & Sioux City Co. must be construed to embrace what was expressly stated as to the other companies, not only as to ordinary taxation, but also assessments for local improvements.

4. *St. Paul & Chicago Ry. Co. v. McDonald,* 34 Minn. 195.

This case was similar to that of *State v. Winona & St. Peter Rd. Co.,* already referred to.

The company entered into a contract with a construction company for the construction of a portion of its line, in consideration of which the construction company acquired three million dollars' worth of first mortgage land grant bonds of the railroad company; second, the whole issue of special preferred stock of the company, which secured to the holders an absolute separate ownership of all the lands which had been or should thereafter be granted to the railroad company; and all of the six million dollars' worth of the common stock. In short, the construction company was to get all the railroad company's property of a tangible nature.

The construction company went on and performed. The original contract was so modified that the construction company returned the preferred stock, and took a mortgage upon all the lands acquired by the railroad company by grant.

Subsequently the railroad company sold and transferred to the Milwaukee & St. Paul R. Co. its entire railroad, and thus became, as the Supreme Court of Minnesota said, "a mere legal shadow."

In view of the foregoing statement of facts, the Court say, including the italicised clause quoted by counsel at page 17 of his brief:

> "If the railway company had, in payment for building its road, sold, or contracted to sell, this land grant in a block by conveyance absolute in form, it would require no argument to show that these lands are taxable. In substance and effect, we think, the same thing has

been done. In short, the evidence compels us to the conclusion that this transaction, although in *form* a mortgage, is in *substance* a conveyance, and was intended to operate as such. *The state should and must, in letter and spirit, religiously keep its contract obligations; but the law will not tolerate the use of mere forms to evade its spirit.* To continue the exemption of these lands from taxation would be a fraud upon the state, and contrary to the meaning and spirit of the statute."

It is thus evident that there is no force whatever derived from the decision in that case useful here upon the subject of contracts. There had been a sale and conveyance for all intents and purposes, and the Court so held. It was merely a question as to the character of a particular transaction, and there was no occasion calling for a construction of the terms of the grant.

5. *County of Stevens v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 36 Minn. 467.

In this case, as in those to which we have referred, the grant providing for an exemption was made in 1857. This company, like the one involved in the Parcher case, lost its property and franchises, which passed to its successor. The Court applied the doctrine of the Parcher case to the effect that the rights, privileges and franchises, including that of taxation, passel to the successor, without merger or extinguishment. The lands were thereupon held not taxable until sold and conveyed. Article

9, Sections 1 and 3, of the constitution, were referred to as follows:

> "The point that sections 1 and 3 of Article 9 of the Constitution forbid this legislation was long ago settled in the *Parcher Case*, above cited, and in the case of *State v. Winona & St. Peter R. Co., supra,* and *City of St. Paul v. St. Paul & Sioux City R. Co., supra;* it being held that those sections of the Constitution did not prevent the legislature from modifying the terms of a provision for the payment of a percentage of gross earnings in lieu of other taxation, *in a case where that method of taxation had been established prior to the adoption of of the Constitution*, and, in the latter case cited, that by the constitutional amendment of 1871 (section 32, article 4), such legislation had been confirmed."

As to the question presented in the Stevens County case, the Court begins its decision with the following language:

> "There is presented here the question of the taxability of the estate or interest which the St. Paul, Minneapolis & Manitoba Railway Company has in its lands after the same have been contracted to be sold, but before the payment of the purchase price, or the performance of the contract conditions so as to entitle the purchaser to a conveyance."

It was expressly stipulated by counsel in the case, among other things, that the state had re-granted "the exemption from ordinary taxation of such granted lands till sold and conveyed by said com-

pany, in consideration of the annual payment of a percentage of its gross earnings," and that the St. Paul, Minneapolis & Manitoba Railway Co. had acquired "all the property, rights, franchises, immunities, exemptions and privileges, at any time possessed by said companies, or either of them, including the exemption from ordinary taxation, * * * pertaining to said line of railroad and said granted lands."

In view of such stipulation, the Court employed the following language, at page 473:

> "But it is contended that this exemption in favor of the First Division of the St. Paul & Pacific Railroad Company never passed to this respondent; that the mortgage through which its title was derived, was not in terms sufficient to include the right in question. *But by the admitted facts* to which we have referred, the contrary is established for the purposes of this case, and we forbear considering this question, upon which, as was intimated by the attorney general when the cause was presented, he should have desired to be heard on the part of the state if the question had been open for consideration."

Plainly, therefore, the decision in the above case does not support the contention of counsel. But, like one or more of the cases previously cited, it leaves the conviction upon the reader's mind that a legislature is without authority to contract away the right of taxation, under the provisions of the constitution of 1858.

There are other cases antedating the decision by the state court in the case at bar, which should be noted.

6. The case of *Com'rs of Rice County v. Citizens' National Bank,* 23 Minn. 280, involved proceedings to enforce the payment of delinquent taxes upon a banking house in one of the cities of Minnesota. The bank answered that it was a National bank, organized under an act of Congress. That the real estate in question consisted of land which was purchased, and the building thereon which was erected, with money forming part of its capital stock, for its immediate accommodation in the transaction of its business; that such land and building became and were a part of the defendant's capital stock, included in the 800 shares into which such capital stock was divided; that all said shares were assessed and taxed in 1874 to the holders thereof, at their full value in money, without deduction of the value of such real estate therefrom, and all the taxes as assessed on such shares were duly and fully paid; and that the taxes in question, which were assessed in 1874 were assessed on property which had already been duly assessed and taxed at its par value, for the same year, and the taxes on which had been fully paid. The Court say:

> "Is real property, lawfully owned and used as a place for the transaction of its business by a bank created and existing under the national banking law, taxable *eo nomine* against

the bank, under Laws 1874, c. 1, it being conceded that the specific provisions of that statute require the assessment and taxation of all the shares comprising the entire capital stock of the association in the name of the respective shareholders, and at their actual cash value, without any deduction on account of the real property so held by the bank, and in which a portion of its capital is invested? This is the sole question for consideration in this case, and its determination depends upon the character and effect of that statute."

After touching upon various features of the statute then in question, which are now quite immaterial, the Court remarked, bearing upon the objection that Sec. 3, Article 9, of the Constitution required the taxation in specie of all moneys, credits, investments, in bonds, stocks, joint stock companies, or otherwise and also all real and personal property, according to its true value in money:

"This section must be construed in connection with Sections 1 and 4 of the same Article, and also in view of the condition of things existing at the time of the adoption of the Constitution. Section 1 declares that 'all taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state.' Section 4 provides that 'laws shall be passed for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description, of all banks and all bankers, so that

all property employed in banking shall always be subject to a taxation equal to that imposed on the property of individuals.' *The leading and controlling purpose of these provisions was to subject all property, of every kind and nature, within the jurisdiction of the state, except such as is specially to be exempted, to taxation upon a basis of a cash valuation, and to secure, so far as practicable, absolute equality and uniformity in the apportionment of taxes,* so that every piece of property should bear its just and proportionate share of the public burden in the exact ratio of its cash value to that of the entire taxable property of the state. To this end Section 3 is directed as specially applicable to all property not employed in banking, nor embraced within the purview of Section 4."

Construing the three sections together, the Court held that the taxation of the property in question would result in double taxation. The case is of value here only as evidencing the views of the Court as to the construction to be placed upon Sections 1 and 3 of Article 9, of the Constitution of the state.

In the case of *State v. Cooley*, 62 Minn. 183, arose a question as to the validity of an ordinance of the city of Minneapolis, exempting certain property used as a market house from taxation. A private corporation had been organized for the specific purpose of erecting a building upon defendant's own land, and furnishing in that building and in the adjoining street, a market place. The proprietors of the property entered into a contract with

the city of Minneapolis evidenced by said ordinance and a written agreement, that the said premises should be used exclusively as a public market for a period of twenty-five years. The ordinance provided that for said period the entire premises should be exempt from taxation. The validity of the ordinance was assailed on the ground of its repugnancy to Article 9, Section 3, of the Constitution of Minnesota. The Court say:

> "Clearly the exemption clause in the Constitution was never designed to cover such a case. If it was, the legislature could amend the present statute so as to exempt from taxation street car, water, gas and electric light companies, and a variety of private enterprises organized and operated for pecuniary gain, but owned by the public in the same general sense, serving the public, and devoted to or used for public purposes as exclusively as is the property in question. We are sure that an amendment to the tax law through which such an exemption was attempted, would at once be pronounced unconstitutional."

In *State v. Pioneer Savings & Loan Co.*, 63 Minn. 80, was involved the question of the validity of a statute of Minnesota providing for the taxation of certificates or shares of stock issued by building and loan associations. The legal effect of the statute was to exempt from taxation the non-resident holders of such certificates or shares. Referring to Sections 1 and 3 of Article 9 of the Constitution, the Court say:

> "These provisions of the fundamental law of the state are imperative, and require that taxes shall be uniform and equal as near as may be, and that all property not exempted by the Constitution shall be taxed according to its true value in money. The method of securing these results is left with the legislature, and the mere fact that the statute here in question seeks to take building and loan associations of the class to which the defendant belongs, out of the operation of the general tax laws of the state, does not make the statute unconstitutional, provided it secures substantially equality of taxation of all the property held or owned by the class for whose benefit the law was enacted. *But whatever the method adopted, the legislature cannot, directly or indirectly, exempt any property from taxation which the constitution does not so exempt.*"

The foregoing case is authority upon the point that any exemption undertaken by the legislature, not expressly authorized by Section 3, Article 4 of the Constitution, is void. And the Court further say:

> "The test, then, of the validity of the statute which we are considering, is whether or not it in effect exempts from taxation any substantial part of the property of building and loan associations."

The Court indulges in the *obiter* remark, quoted by counsel for the St. Paul & Duluth R. R. Co.:

> "It is true, as claimed by counsel for defendant, that the law providing for the taxa-

> tion of property is not unconstitutional because in its practical operation property which ought to be taxed escapes the burden."

But the Court immediately proceeds to say: "*But such is not this case.*" We fail to see, therefore, upon what ground the learned counsel claim "that it is a conclusive authority on the proposition that the act of March 3, 1865, in providing for a system of taxing the gross earnings of the St. Paul & Duluth Railroad, as representative of its property, was constitutional, etc." It was necessary for the Court to construe Sections 1 and 3, and it was apparent to it that certain property was not taxed at all, and hence the law was adjudged to be unconstitutional.

In *State v. Lakeside Land Co.*, 71 Minn. 283, was involved the validity of a statute providing for the taxation of mining property in the state, as follows: "For each ton of copper, 50 cents, and for each ton of iron ore mined and shipped or disposed of, 1 cent."

The Court, basing its opinion upon the legal effect of Article 9, Section 1, of the constitution, say:

> "It would be difficult to conceive of a system of taxation more obnoxious to the constitution."

The argument advanced by counsel for the plaintiff in error, that a gross earnings system of taxation is justified by the fact that the revenues derived

by the state will increase with the growth in the volume of business transacted by the company, is met by the legal force of the case just cited. It is clearly equally true that the revenues derived by the state from such a method of taxation of mining property would increase with the increase in the output of the mines.

The case last cited is especially important because of the fact that it is the first case where the question is squarely presented, arising in the State of Minnesota, unaffected by the constitutional amendment of 1871, whether the legislature can adopt an arbitrary rate of taxation based upon the volume of business. The decision is a clean cut denial of the doctrine.

In the case of *State v. Luther,* 56 Minn. 156, cited by plaintiff in error in several briefs of counsel, and greatly relied upon by them, an attempt was made to secure the taxation *in specie* of the granted lands of the St. Paul & Duluth Railroad Co. Two questions were presented for the consideration of the court, the one, a construction of the granting act under which the company claimed immunity from ordinary taxation, and the other, the constitutionality of such granting act. The first question is immaterial here. As to the constitutional question, namely, whether Sections 1 and 3 of Article 9 of the constitution, permit the taxation of said granted lands under a gross earnings tax imposed upon the earnings of the company, the Court declined to express an opinion, and said:

> "Conceding, without deciding, that tax laws such as we are now considering, were invalid when enacted, still we are of the opinion that the effect of the constitutional amendment of 1871, (Article 4, Sec. 32 (a)), was to validate all such laws relating to the taxation of railway property."

A re-argument was asked for and denied, but the Court in denying such application, took occasion to remark:

> "But inasmuch as an obiter remark in the opinion might be understood to mean that acts providing for a commuted system of taxing railroad property and granted lands, constitute contracts between the state and the railway companies which cannot be repealed or amended, it is proper to say that no such question was before the court, and that the remark referred to was not intended to express or intimate any opinion on that point."

It goes without saying that after the Court had held that the amendment of 1871 was a validation of the pre-existing legislation providing for a gross earnings method of taxation, all that was said as to the legislative power of the state in providing for the taxation of railroad companies, or others, was mere *obiter*. It is worthy of note, too, that the able justice who wrote the opinion in *State v. Luther, supra,* wrote the opinion also in *State v. Lakeside Land Co., supra.*

We fail to perceive the force of the argument advanced for plaintiff in error, founded upon the

language of Section 1 of Article 9 of the state constitution. Even if we were to concede the construction urged by counsel that a gross earnings method of taxation is permissible under that section, would that establish a legislative right to enter into a contract which disregards increasing values, and undertakes the impossibility of prescribing a fixed rule that will measure justice in taxation for a century or more? Whether a gross earnings tax be or be not permissible, it is clear that one legislative body cannot tie up the hands of a future one. To hold that the legislature of Minnesota had the power in 1865, or other years prior to 1871, to contract for a three per cent gross earnings tax, is to hold that the constitution does not require equality and uniformity of taxation, and does not prohibit exemption save as to enumerated classes. It is as repugnant to a proper construction of the constitution that a gross earnings rate may be a fixed quantity, as that a fixed value of real estate may be adopted. It is idle to attempt to draw a distinction between the two methods based upon the fact that under the former the tax will increase with the growth of the volume of business transacted by the railroad company, which would not be true of real estate. As no legislature has been endowed with the wisdom to so forecast the future as to know what the volume of business of a given railroad company, or the extent of the burden of taxation imposed upon other property, will become in future years, so, manifestly, the wholesome rules of the Minnesota constitution never contemplated that the

legislature should attempt a scheme of taxation invariable and incurable in its nature, embodying such an element of uncertainty. Granting, for the purpose of argument, that a gross earnings system is permissible, there necessarily accompanies it the power to change and rectify it as inevitable mutations in conditions shall from time to time require. And this is in accord with a recent decision by the Supreme Court of Minnesota, where it is said:

> "But we are of opinion that under our constitutional provisions requiring uniformity of taxation, the legislature cannot, even in aid of a public purpose, make an irrevocable contract exempting private property from future taxation, because, even if it is admitted that thereby the legislature did nothing more than anticipate such future taxes and apply them in advance to a specific public purpose, still it is impossible for the legislature to tell at present what in such a case will be uniform taxation in the future, or that by such arrangement such property will bear its just and equal share of such future taxation."

Counsel combat the view thus expressed by the Supreme Court of Minnesota upon two grounds:

1. That the legislature is not confined by the constitution to fixing a new rate of taxation every year; and

2. That the doctrine is overruled by the decisions of this Court.

It is asked: "May not the legislature fix a rate on land for five years to come, and leave the rate on personal property to be fixed annually?"

If this were conceded, it would not militate against the views of that court. For sound public reasons a legislature might provide that the assessment of real property shall not be made as frequently as that of personal property. The nature of the subjects would warrant such a rule.

But the Court rests its decision upon the ground that under the constitutional rule of that state the legislature must be at liberty at all times to seek uniformity and equality of taxation. It is to be presumed that it will always seek to accomplish it. In the very nature of the case an inflexible rule is unconstitutional, because uniformity and equality cannot be secured under it. As well might it be urged that the legislature had the power under the constitution of Minnesota to commute taxation forever by the acceptance of a gross sum. Does the principle differ when it undertakes to accept annual payments instead? It is commutation in either case. Was the legislature in any better position in 1865 to fix upon an adequate gross earnings rate as a just equivalent for taxation of their lands, than it was to fix upon an adequate fixed sum payment? In either case it was clearly impossible, as the state court remarked, "for the legislature to tell at present what, in such a case, will be uniform taxation in the future, or that by such arrangement such property will bear its just and equal share of such future taxation."

We now call attention to cases cited by counsel for the plaintiff in error, in support of the proposi-

tion that the doctrine of the Supreme Court of Minnesota is overruled by this and other courts.

An examination of *Piqua Bank v. Knoop*, 16 How. 369, will show that no such question was adjudged.

A general banking law passed in 1845 prescribed a method of taxation. Banks accepting the provisions of the act and complying therewith, were to be so taxed, which tax was to be in lieu of all other taxation. An act was passed in 1851 materially modifying the earlier act. The earlier act was held to be a contract with accepting companies. Neither in the statement of facts, the briefs of counsel, nor the opinion of the Court, is there any reference to the Constitution of Ohio. So far as the case discloses, the legislature was free to act in 1845.

In *Jefferson Bank v. Skelly*, 1 Black 436, was involved a similar question to that involved in the Knoop case, and the decision therein was followed. No reference whatever is made to the constitution of Ohio, save to the new constitution adopted subsequent to the making of the contract.

In *University v. People*, 99 U. S. 309, the constitution of 1848, under which the contract was made, provided:

> "The property of state and counties, both real and personal, and such other property *as the General Assembly may deem necessary for school*, religious and charitable purposes, may be exempted from taxation."

In 1870 a new constitution was adopted radically different from that of 1848. A statute was enacted providing for taxation in conformity with the requirements of the constitution of 1870, and thereupon the authorities of the state sought to subject the property of the university thereto for the purpose of taxation.

The above statement of facts is enough to show the inapplicability of the case to the one at bar.

In *Asylum v. New Orleans*, 105 U. S. 362, the charter of the institution provided that all the property, real and personal, "be and the same is hereby exempted from all taxation either by the state, parish or city in which it is situated, any law to the contrary notwithstanding."

The property in question was a cotton press bequeathed to the institution, and it was stipulated that the revenues of the press were to apply to the keeping and maintaining the objects of charity mentioned in the charter of the asylum. The constitution provided:

> "The general assembly shall have power to exempt from taxation property *actually used for church, school or charitable purposes.*"

There was no question by the state court but what the contract was permissible under the constitution. Inasmuch as a standing law of the state authorized the abrogation of corporate charters, it was not deemed by the court that the power included the power to alter and amend. In short, it was held by this Court that the exemption was expressly au-

thorized by the constitution. The question of uniformity or of equality of taxation does not appear to have been raised. It certainly was not considered by this Court.

So it is manifest that none of the decisions of this Court, cited and relied upon by counsel, are in point.

The same conclusion must be reached, we think, as to the cases cited from the courts of several states.

Under a constitution providing that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe," the Supreme Court of Wisconsin in several cases, notably *M. & M. R. R. Co. v. Supervisors*, 9 Wis. 431, and *Weeks v. Milwaukee*, 10 Wis. 186, held that exemptions were precluded. These cases were, however, overruled by *W. C. R. R. Co. v. Taylor*, 52 Wis. 37. In the last named case the question was whether the lands of a railroad company were exempt from taxation by reason of the terms of a granting act which stipulated that the lands should be exempt for a term of years. It was held that the exemption was valid. The views of the Wisconsin Court leave no room for doubt that had the constitution of that state been like that of Minnesota, the decision would have been in accord with the views of the defendant in error in the case at bar. At Page 63 of the opinion, the Court say:

> "The import of the provision in the Iowa constitution was the nearest approach to the one adopted in this state, but the phraseology

used was very different. The question of prohibiting all exemptions and authorizing certain exemptions was brought prominently before the convention, and after discussion to the effect that the naming of certain exemptions would impliedly prohibit the legislature from granting any others, the convention refused to specifically name the property to be exempted, so an amendment was proposed in these words: 'Section 1. All taxes levied in this state shall be uniform and equal, and shall be assessed upon a just valuation of real and personal property.' But the amendment, with another section relating to exemptions, was voted down. This proposed section, so voted down, was almost identical with a portion of the section then existing in the constitutions of Tennessee, Arkansas, Louisiana and Texas, but in Texas, Arkansas and Louisiana it had an additional feature.

"The section originally proposed in open convention was: 'Section 1. All taxes levied in this state shall be as nearly equal as may be,' *with another section covering exemptions.* But finally the latter section was stricken out, and the first section was amended by adding the words 'and shall be levied upon such property as the legislature shall prescribe.'

"It would appear from the debates in the convention that some were in favor of binding the legislature firmly, both as to taxation and exemptions, while there were others who favored flexibility as to both. The result was a compromise, and the adoption of the unique expression upon the subject found in our fundamental law. Possibly it would have been bet-

ter for the people at large, had the constitution, in addition to a *uniform rule of taxation, required an equality of valuations and assessments, and prohibited all discriminations, by provisions similar to those which then existed in some of the constitutions to which we have referred.*"

Criticising one of the earlier decisions of that court, holding to a contrary doctrine, in *Weeks v. Milwaukee,* 10 Wis. 108, and wherein a remark of the Court in *Exchange Bank v. Hiems,* 3 St. 15, that "uniformity in taxation implies equality in the burden of taxation," was approved, the Court further say, at Page 70:

"But the learned Justice failed to note that Bartlett, C. J., was construing a section in the Ohio constitution adopted *three years after the constitution of this state was adopted,* and which, instead of following the language of our constitution, read as follows: 'And laws shall shall be passed taxing by a uniform rule *all* (the italics are the court's) moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also *all* real and personal property according to its true value in money,' except certain exemptions named. And so it appears that Bartlett, C. J., was construing a constitution containing an important provision taken from constitutions *which our convention in substance refused to adopt,* and hence he said: 'This provision requires *all property* of every description in the state, to be taxed by a *uniform rule,* and at its *true value in money,* with the exception of certain

> enumerated exemptions.' (The italics are in the original.) Under such a provision there would be no difficulty in holding that all property of every description in the state must be taxed at its true value in money by a uniform rule, and hence the burden of taxation would necessarily be equal. But the legislature of Wisconsin were never under any such constitutional restriction, and the people in constitutional convention assembled refused to so limit the legislative power."

No constitutional question like the one at bar was involved in *Trustees v. Iowa*, 46 Ia. 275, which was merely a construction of the statute. The statute of that state provided for the exemption of "all publice libraries, grounds and buildings of literary, scientific, benevolent, agricultural and religious institutions and societies devoted solely to the proper objects of these institutions." The main question there decided was, whether the residence of a professor of a college, and the residence of a bishop who was rector of a church, were exempt under such statute. The only other question considered was, whether the statute violated Sec. 3, Article 1, of the constitution of that state prohibiting the making of a law respecting an establisment of religion, or the free exercise thereof, or compelling one to attend or maintain a place of worship. The main question was answered in the affirmative.

Two Kansas decisions are cited by plaintiff in error. In the first of these, *Gulf Railroad Co. v. Morris*, 7 Kan. 210, the only important question

presented of a constitutional nature was, whether the mode or manner, not the power, of assessing railroad property, was constitutional. There was no question of contract. Under a general law the property of the railroad company was assessed by different officers than the ordinary assessing officers. The constitution provided that "the legislature shall provide for a uniform and equal rate of taxation." The Supreme Court of Kansas say:

> "The constitution does not require the manner or mode of assessing and taxing property, or the manner or mode of collecting the taxes, shall be equal or uniform; but it simply requires that all property shall be taxed at a uniform and equal rate."

If in that case the company had been contending that by reason of certain legislation it enjoyed the vested right of having its property taxed at some particular rate, or in some particular manner, the case had then been of value now. Such was not its nature, however, and we fail to perceive its present importance to this discussion.

Nor was there in *Francis v. A. T. & S. F. R. Co.*, 19 Kan. 303, anything which supports the argument of the learned counsel. There the question was whether railroad property situate in unorganized counties, could be assessed by the state auditor, as provided in the statutes of that state. Citing and following *Gulf Rd. Co. v. Morris*, it was said that the constitutional requirement "does not compel the use of but a single mode of assess-

ment." No contract was or could be asserted or passed upon. It was but another holding to the effect that the constitution of Kansas did not prevent the particular mode of taxation. Calling attention to the constitutional provisions of the several other states, Mr. Justice Brewer says:

> "In all these provisions will be noticed either an express direction to tax all property, or an express prohibition on exempting any other than certain specific property. Our constitution does neither. Does it mean the same without as those do with? The positive language of these two sections sustains, if it does not compel the positive assertions of the various decisions cited by counsel. *Those decisions rest upon the clear commands and prohibitions of the constitution upon which they were based, and are therefore only of limited and qualified application here.*"

The whole decision is summed up in the following language:

> "We hold, and that is all that is necessary for this case, that where the rate of taxation is fixed by legislative enactment, or the assessment of all of a particular kind of property throughout the state, such as railroad property, is made by a single state board of assessors, and where a part of such property is in the unorganized counties in which is no machinery for or attempt to collect taxes, and therefore no board of equalization, that a failure to provide for a re-examination of assessments of such property in such unorganized

counties, or an equalization thereof by a state board of equalization, does not render the tax void."

In *Louisiana Lottery Co. v. State,* 24 La. An. 86, no question of contract was presented, but merely the authority of the legislature to commute the tax of the plaintiff.

In *City of New Orleans v. Kaufman,* 29 La. An. 283, was involved an ordinance of the city of New Orleans exacting a license from junk dealers. *Held,* that it did not violate the rule of uniformity or equality.

In *New Orleans v. Davidson,* 30 La. An. 544, was involved the question whether the legislature was authorized to exempt certain real and other property. Reference to the constitutional provisions of Louisiana is sufficient to demonstrate the correctness of the above decisions.

People v. Auditor, 7 Mich. 84, and *Youngblood v. Sexton,* 32 Mich. 406, were rightly decided, in view of the constitution of Michigan, which has not only adopted a rule of uniformity, but declared "that taxes shall be levied upon such property *as shall be prescribed by law.*"

State v. Runyon, 41 N. J. Law 98, was rightly decided under the constitution of New Jersey; yet in truth there was no other ground for the objection made to the statute. It was a question whether the rule of uniformity had been observed in the taxation of mortgages. How little merit there was to the objection, appears from the following excerpt from the decision:

"The precise objection made by counsel to this law in this respect, is that it lacks the quality of uniformity, in that it does not subject all mortgages alike to taxation, but leaves the question whether the owner of a mortgage shall submit to taxation on it at the mere caprice of the mortgagee. If regard be had to the substance of the law, and not to mere form, it is apparent that all mortgage interests are in effect made by this act liable to taxation. If the mortgagee chooses to pay that part of the tax which would be represented by the value of the interest of the mortgagee, he may do so. In that event, the mortgaged premises are valued without any abatement in valuation because of the mortgage debt. If, on the other hand, the mortgagee is unwilling to pay that part of the taxes which is appertainable to the mortgage interest, he may do so by claiming a deduction thereon. And in that event, instead of taking a receipt for that portion of the tax, as he was permitted to do under the act of 1854, and being allowed the amount on account of the interest of the mortgage debt, he may do so by simply claiming a deduction, and then the tax is laid in form directly upon the mortgage."

Kittanning Coal Co. v. Commonwealth, 79 Pa. St. 100, was another case involving only the question of uniformity. The question of the effect of the enumeration of specific exemptions upon the power of the legislature of that state to make additional exemptions, can never arise, because of the effect of Sec. 2 of Article 9, which makes all such attempts void.

In *Mississippi Mills v. Cook*, 56 Miss. 40, it is expressly held that, while the legislature may exempt classes of property from taxation, *it cannot withdraw property from taxation beyond the reach of legislative recall or influence.* The Court say, at Page 54:

> "The true view is that this provision of the constitution fixes beyond legislative act the condition of the property of all corporations for pecuniary profit, as being always liable to the exercise of the taxing power, so as to subject it, at the will of the legislature, to the same taxation as the property of individuals may be subjected to. The legislature may exempt property of a certain class, whether owners be corporations or natural persons, but corporate property shall never be placed beyond the reach of the taxing power. *It may not be taxed, but it must be ever liable.* It need not be 'subjected' but it must always be 'subject' to taxation, the same as that of individuals, for the constitution so declares. The provision is mandatory as to universal liability to pay taxes, but permissive to the legislature to tax the property of such corporations as it may see proper, in common with the property of individuals, which may be taxed or not for the time being."

In short, under the constitution of that state the legislature cannot enter into contracts, irrevocable or otherwise, granting away the sovereign right of taxation. This was so in the face of language less stringent than that of Article 9, Section 3, of the

constitution of Minnesota. The constitution of Mississippi expressly provided that the legislature "may provide for a special mode of valuation and assessments for railroads, and railroad and other corporate property."

In *Illinois Central Railroad Co. v. McLean,* 17 Ill. 291, the Court sustained a gross earnings law. This was based upon the language of the constitution which empowered the general assembly to tax "persons using and exercising franchises and privileges, in such manner as they shall from time to time direct."

But in the later case of *Hunsacker v. Wright,* 30 Ill. 146, it was expressly held that while the legislature might commute, it had no power under the constitution to exempt any person or class of persons from the payment of taxes, a doctrine which had been announced in earlier decisions.

Trustees v. McConnell, 12 Ill. 138,
adhered to in later cases.
Northwestern University v. People, 80 Ill. 333;
Same v. Same, 86 Ill. 141.

The question of contract was not presented or considered in any of the Illinois cases above cited.

Under the constitution of Arkansas the legislature is held authorized to select the classes of property "subject to taxation."

In *State v. Crittenden County,* 19 Ark. 360, the words "subject to taxation" were italicised. In the case of *Pike v. State,* 5 Ark. 205, the right of ex-

emption was denied, but that decision was overruled by later ones in that state.

We desire to call attention to the case of *Hogg v. Mackay,* 31 Pac. 780. The constitution of Oregon provided that "all taxes shall be equal and uniform," and the legislature "shall provide by law for uniform and equal rate of assessments and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property." In the case last cited the Court say:

> "The language of the constitution is plain, simple, and easily understood, and manifestly operates as an absolute inhibition against the exemption, either directly or indirectly, of any property from taxation, except that specially enumerated."

A line of decisions has arisen within the State of Minnesota construing grants, in which it is invariably held that a statute providing for a gross earnings method of taxation contemplates only such property, apart from the subject of grant, as is held and appropriated to the proper purpose of the corporation in its business of constructing and operating a railroad. Several cases cited by counsel representing the St. Paul & Duluth Company, at Pages 67 *et seq.* of former brief, are of that character. From what is said by counsel at Page 69, these cases were cited for the double purpose of showing (1) that the Supreme Court of Minnesota has always deemed the gross earnings method of taxation as not an exemption but a commutation

of taxes, and (2) that such a method is not a gratuity but an inviolable contract.

Unfortunately for counsel, the cases cited involved grants antedating the adoption of the constitution of 1858, with the exception of the Northern Pacific Co. case. But unfortunately again the term "obligation," as used in the quotation of counsel in their brief, did not refer at all to the grant to the Northern Pacific Co., but referred to the old territorial grant from which the St. Paul, Minneapolis & Manitoba Ry. Co. had derived its title, so that the contracts of which the Court was speaking were, in every case, contracts which the state is not attempting to assail.

As we have repeatedly elsewhere remarked, this is not so much a question whether a gross earnings, substituted, or commuted system, (whatever name be adopted), is permissible, as it is whether the legislature may by contract limit the power of the state over the subject. We deny, as already asserted, that the legislature can single out, under the constitution of Minnesota, one owner of real property and tax his property by a different rule from that which is prescribed for the taxation of the real property of other owners, of a similar character. The constiution forbids it in express terms; nor has it ever been countenanced by any decision of the Supreme Court of Minnesota. What that court has repeatedly said in construing territorial grants, argues, without a single exception, that but for the fact that the statutes were passed before the constitution was adopted, granted lands

could only be taxed *co nomine* and in conformity with the method adopted for the taxation of all other lands in the state. No case exists in that state holding that a contract could be made under the existing constitution independent of the amendment of 1871 thereto.

Replying to the remark of counsel, that from the earliest times it has been the common understanding of the authorities of the state that a gross earnings system of taxation is permissible, we repeat that such fact does not affect the question at bar. All this might safely be conceded without yielding an iota upon the general proposition that a railroad company's lands cannot be favored in the taxation system of the state. As the Supreme Court of Minnesota well said in this case:

> "The mandate of the constitution applies to all property which is the subject of private ownership, without reference to the source of its acquisition. It would be a palpable evasion of the constitution to permit the legislature to absolutely transfer public lands to private owners vested with privileges and immunities as to taxation which are prohibited by the constitution."

V.

The constitutional amendment of 1871 served merely to temporarily validate void laws and to authorize gross earnings legislation in the future.

So the Supreme Court of Minnesota holds:

State v. Stearns, 72 Minn. 200.

County of St. Louis v. D. & I. R. R. Co., 80 N. W. R. 626.

In both of the cases cited the doctrine is "that the constitution under which it is claimed that the lands in question are exempt from taxation in the ordinary way upon the basis of their cash valuation, were unconstitutional when enacted and remained so until validated by the constitutional amendment of 1871. The legal effect of such amendment was to validate them. But this ratification or validation of the statutes was a qualified one, and the right to repeal or amend them was reserved by necessary implication, provided such repeal or amendment was adopted and ratified by a majority of the electors." (Record Page 69.)

> "Under the provisions of our constitution requiring uniformity of taxation and requiring all property, except certain specified exemptions, to be assessed by taxation according to its true value in money, the legislature had no power to pass a gross earnings law, except as permitted by said constitutional amendment of 1871."
>
> 80 N. W. R. 626.

The language quoted by counsel for the plaintiff in error from *State v. Luther* is, as we have already stated, *obiter*. The Court so admitted upon the application for re-argument. Counsel are therefore inaccurate in stating that it was decided "that a contract between the State and the Company which

insures to the railroad company a continuance of the right to have the commuted form of taxation is provided in the act." It is thus obvious that the statement of the Court made when denying an application for re-argument that "no such question was before the Court and that the remark was not intended to express or intimate any opinion on that point" was wholly overlooked.

It is a significant circumstance that on no occasion when that amendment has engaged the attention of the Supreme Court of Minnesota has language been used which either expressly, or by strong inference, supports the proposition advanced by the plaintiff-in-error that neither a repeal nor an amendment of a gross earnings tax law could be effected without the consent of the company affected by it. No such language is suggested for the consideration of this Court, because it cannot be discovered. On the other hand, the State Supreme Court has, on several occasions, in cases already cited, said that such laws may be repealed at the will of the legislature when ratified by a submission of the repealing act to a popular vote.

That this was the intention of the framers of the amendment is fully borne out by its own intrinsic evidence. It is prospective as well as retrospective. It applies to general as well as special laws. It was designed to prevent frequent changes in the taxation of companies. Significantly, it forbids repeal or amendment. If the people of the state had become alarmed by frequent and radical reductions in rates of taxation, the prohibition would have

been expressly aimed against further reductions and stopped there. Is it reasonable that by that amendment the people of the state commissioned the legislature to enact any law upon the subject, however unjust, general or special, which could never thereafter be changed without the consent of the companies affected by it? The position of counsel is that the legislature is now and always has been, regardless of the amendment of 1871, at liberty to enter into a contract with a railroad company upon the subject. However unjustly low the rate, whether three per cent or one-tenth of one per cent upon the gross earnings of a company, it will stand forever as the rule of taxation for that company, *unless the company shall consent to a change!* Such a constitutional provision would impeach the intelligence of both the legislature which submitted and the people who ratified it.

The only just construction which can be placed upon its terms, the one which accords with the spirit which must be presumed to pervade every constitutional provision—the protection of the public welfare, is the one adopted by the Court below.

Counsel press with great insistence the proposition that inasmuch as many of the previously enacted laws cleraly secured contract rights which could not be changed without the consent of the companies affected, it must be presumed that the same rule was intended to apply both to state and territorial legislation. *But the constitution has not said so.* It is a clear authorization both to re-

peal and amend. The power to amend implies the power to raise as well as reduce the rate of percentage. Can there be any question of the validity of an act which shall raise the rate provided it is ratified by popular vote? Does the constitution imply that future legislation shall impose a rate of three per cent and no other? Does it anywhere declare that future acts shall be valid only when accepted by the companies to be thereby affected? If a gross earnings tax is permissible, and the State Court has so held by reason of the amendment, must the legislature consult the wishes of railroad companies before an act is passed? And is it powerless to act without their sanction? Clearly, the people of Minnesota did not so unwisely amend their constitution that its legislature became dependment upon private interests when shaping future legislation. If this be true of future legislation, why is it not equally true of what had been previously enacted? There were past laws, as we know, and as the record shows, which had been passed since 1858 upon which the amendment would operate. Both past and future legislation therefore came within the reach of the amendment.

The amendment, as the Supreme Court of Minnesota holds, performs two offices: (1) It temporarily validated the invalid; and (2) authorized future legislation upon the subject.

It is obvious that the amendment can be resorted to by the plaintiff-in-error only upon the theory that without it the companies had no contracts. If that be found to be their situation, then it is con-

tended on their behalf that the amendment itself operated to make the several acts valid *ab initio* and hence created contracts as effectually as if the power to contract had not been originally wanting.

But there is a broad distinction between validating an unauthorized method of taxation and creating contract rights.

The continuance of the gross earnings method of taxation is not because any contract rights had been acquired, but because the people have so ordained by virtue of the amendment. *It was not to protect or benefit railroad companies that the constitution was so amended but for the protetcion of the people themselves.* If no contract did exist, what motives could have actuated the people of the state in thus creating them or providig for them in the future? Counsel have no where suggested, nor can they suggest, any ground for such action.

When, therefore, we search for the reason of the amendment, or the intention of its framers, it is found to be quite foreign to the object contended for by counsel.

Clearly, the companies must stand or fall upon the original force of the acts under which they claim. The amendment of 1871 does not in terms or by necessary implication create contract rights. Nor has the Supreme Court of Minnesota in any case ever held to the contrary. The language of Mr. Justice Mitchell, so largely and frequently quoted from *State v. Luther*, no where suggests it. The Minnesota Court has many times impliedly and, in several instances, has expressly, held that

the amendment by plain intendment confers upon the legislature unqualified power to continue or overthrow the gross earnings system as to all companies not taxed under territorial charters.

Whatever legislation has been enacted since 1871 is, so far as it exceeds the limitations imposed by the amendment, void. All state legislation, whether passed prior, or subsequent to, that year stands upon the same ground in such regard. It is all supported, so far as the method of taxation is concerned, only by force of the amendment. Nor should it be overlooked, that all of the cases adjudged by the state court since the decision in the Parcher case, not involving territorial grants, have been influenced by that amendment. The gross earnings method was sustained, not because contracts existed, but because it was a lawful method of taxation by force of the amendment. The weakness of the position of the companies is exposed by their own argument. They contend that there were but a few railroads paying gross earnings taxes in 1871 which were operating under charters granted by the legislature of the state. They admit that the amendment is prospective. They maintain that the legislature was powerless to act upon territorial charters without the consent of grantees. Do they also claim that the legislature could not pass a gross earnings law in future without the consent of the railroad companies to be affected by it? Such a claim would clearly be fatal, for it would be equally true that it was not a lawful method of taxation in 1865 and 1870. If

it became lawful by virtue of the amendment in 1871, and if it rests upon *value*, as counsel strenuously urge, then it is "monstrous," to borrow their own word, that the legislature should bind the state by irrevocable contract in a matter where there was full power to act without it, and no consideration was received. It reduces itself to this, that a railroad company by agreeing to pay its lawfully imposed taxes thereby so fetters the state forever after that it can impose no other tax. Clearly, such a proposition does not rest upon any sound view of the law of this country.

We submit that if the only purpose of the amendment was, as claimed, that there could be no reduction of the rate of taxation, and that that was the only evil to be guarded against, the language employed would have clearly so stated. It prohibits *repeals*. Will counsel argue that if the legislature had repealed the gross earnings provision of their grants, there could have been no further taxation? It prohibits *amendments*. Did the people of the state assume that railroad companies would assent to a raising of their rates?

The prime purpose of the amendment was to authorize a system of taxation and give it stability.

But we are brought back to the fundamental proposition that an invariable gross earnings rate cannot be, in the very nature of the case, a compliance with the constitution of Minnesota. It requires no proofs because self-evident. Whether it yields too much or too little at a given time, is to the Court immaterial.

It may have been deemed in 1871 as then productive of a fair amount of revenues to the state. The people of the state were willing to permit the existing rates to stand until time should demonstrate the need of change. But this does not argue that by the amendment of 1871, the constitutional rules of uniformity and equality, and its prohibition against exemptions, were to be abrogated.

It will be a more proper time to consider the validity of a gross earnings tax, as to other subjects, when a case involving that question arises.

The position of defendant in error finds great support in the following cases:

Welch v. Cook, 97 U. S. 541.
Railroad Cos. v. Gaines, 97 U. S. 697.
Huntington v. Worthen, 120 U. S. 97.

These cases were cited in our former brief. In addition to what is there said as to *Railroad Cos. v. Gaines, supra*, we note that the Memphis & Charlestown R. Co., one of the companies affected by the decision, claimed a contract with the state by the acceptance of Section 11 of the act of 1875, and that the obligation of that contract was impaired by a subsequent law.

The plaintiff in error in the case at bar contends strenuously that this Court shall determine for itself whether or not the several railroad companies acquired contract rights by the several acts upon which they rely. But in the case cited the Court felt called upon to follow the construction placed by the state court upon the constitution of Tennes-

see. Counsel at bar contend for a distinction between this case and the *Gaines* case, on the ground of the lapse of time. We are unable to perceive how the action of this Court can be influenced by any such circumstance. The short of it is that this Court, in a case arising in 1878, involving a constitution adopted in 1870, and a statute under which a contract was claimed, enacted in 1877, followed the state court's construction of the constitution, and say:

> "If nothing had been done until the charter exemption expired, it is clear that under the construction which the courts of the state have given to the constitution, no contract for the taxation of the company according to the provisions of the eleventh section of the act of 1875 could have been sustained. The only question therefore which remains, is whether in 1875 the legislature could contract for a surrender of the remaining charter exemptions by binding the state not to tax the company for ten years in any other manner than that provided for in Section 11.
>
> "The constitution has subjected all property in the state to the burden of uniform taxation according to its value. So the courts of the state have decided. The legislature has no power to contract for relief from this burden. It could not do it for a money consideration, and if not for that, clearly not for any other. This is one of the disabilities under which the people of the state have placed their government. But for it taxes might have been commuted, or they might have been withheld.

> "There is no doubt of the power of the legislature to contract with a company for a surrender of its charter exemptions, in a way that did not involve a release from the constitutional mode of taxation after the charter exemption had expired. Such a release is, however, as we think, prohibited by the constitution as construed by the highest judicial authority in the state."

Counsel suggests what to us appears a very insufficient reason why the same course should not now be pursued by this Court. We request attention to a comparison of the constitution of Tennesee with that of the State of Minnesota. The constitution of Tennessee provides:

> "All property, real, personal or mixed, shall be taxed; but the legislature may except such as may be held by the state, by counties, cities or towns, and used exclusively for public or corporate purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational. * * * All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state.

The constitution of Minnesota is set forth in the early part of this brief.

With respect to the constitution of Tennessee this Court say:

> "Such a release (from taxation) is, however, we think, prohibited by the constitution as con-

strued by the highest judicial authority in the state."

In *Huntington v. Worthen, supra,* was considered the constitution of the State of Arkansas, which provided:

> "All property subject to taxation shall be taxed according to its value," and was to be "equal and uniform throughout the state."

It exempts certain enumerated classes of property.

This Court, in construing that constitution, say:

> "As thus seen, no part of the property of railroad companies is exempt from taxation, and any law which exempts it is in express terms declared to be void. But laws which indirectly produce such exemption must be equally inoperative. That cannot be accomplished indirectly which the organic law declares shall not be done directly. The assessment of property, that is, the appraisement and estimate of its value, is the basis upon which the amount of the tax is fixed. A law, therefore, omitting from assessment portions of any particular property, thus lessening the estimate of its value, has the effect of exempting it to that extent from taxation. That result canot be accomplished, as well observed by the Supreme Court of the state, under the guise of regulating the duties of assessors."

We emphasize that portion of the language just quoted, which declares that *the lessening of the estimate of the valuation of property is an exemption*

within the meaning of a constitution which forbids exemption. Any law, therefore, which has this effect, and which the Court can see must necessarily have such effect, is offensive to such a constitution. Such is precisely the question at bar.

The amendment of 1871, left the legislature with full power to act, with the exception that there was to be a *referendum*. It had the power to segregate granted lands for purposes of taxation from the other classes of real property. It was in position to treat the whole subject, as if for the first time presented, in such wise as it deemed expedient. It was in position to fix a new rate upon gross earnings or to tax the granted lands *co nomine* under the general tax laws of the state. But whatever action was taken by it, it would become operative as law only by popular ratification. What it did in effect was to declare that the three per cent gross earnings tax should be the rule for the taxation of all the property of said companies except their granted lands, which thereafter were to be taxed *co nomine*.

This view is fully sustained by the doctrine announced in the *Pennsylvania College Cases*, 13 Wall. 190. It is so, not only as to future legislation, but equally so as to past legislation. As to future legislation, it justifies the construction that the amendment of 1871 is a reservation saving to the state the right of amendment. So, as applied to past legislation, it is a complete answer to the argument of counsel that the power to repeal or amend is restricted to cases in which grantees have assented

thereto. In that case, a charter was construed containing the following language:

> (The constitution of the College) "*shall not be altered or alterable by any ordinance or law of said trustees, nor in any other manner than by an act of the legislature of the Commonwealth.*"

VI.

The Constitution of Minnesota becomes *eo instanti* upon all property, real and personal, when it passes into private ownership.

As the Supreme Court of that state said in this case:

> "If this proposition is true, then the legislature, if there are no other constitutional provisions prohibiting it, may provide for exempting from taxation the school lands of the state after their sale and after they have become absolutely private property, or provide that the owners thereof may forever pay a percentage on the gross or net income derived therefrom in lieu of all other taxation. The mandate of the constitution applies to all property which is the subject of private ownership, without reference to the source of its acquisition."

It is too plain for discussion that "these lands were not subject to taxation so long as they remained public lands," and that "they could not be taxed until after they passed out of public owner-

ship." But when they cease to be *public lands*, we might differ with counsel. Counsel proceed upon the assumption of a case where the state is itself engaged in the enterprise of building, as a sovereign, a railroad. But the state was doing nothing of the kind. She was merely extending her aid to private parties who had embarked in the enterprise as a private speculation. It argues nothing to say, as counsel do, that the state might have reserved the title to the lands and provided for a conveyance from time to time. In such event, they might not have been taxable for the reason that they would not have been brought before conveyance within the reach of article 9 of the constitution. We shall not concede, however, that the retention of the mere naked legal title by the state, to suit the convenience of the grantee, would have saved the grant from liability to taxation. In such case they would be *owned* by the company and would doubtless be taxable.

Carroll v. Safford, 3 How. 441.
Witherspoon v. Duncan, 4 Wall. 210.
Winona & St. Peter L. Co. v. Minnesota, 159 U. S. 526.
Dickerson v. Yetzer, 53 Ia. 681.
Rd. Co. v. Morris, 13 Kan. 302.

The cases cited by counsel from other states arose in matters where the state was undertaking, as a sovereign, to engage in public improvements. In Michigan she was building a canal. *People v. Auditor*, 7 Mich. 84. In Maine, she was authorizing a

city to provide itself with water. *Portland v. Water Co.*, 67 Me. 135. In Arkansas, she was providing for the raising of money by means of her swamp land grant to enable counties to drain their wet and overflowed lands. *State v. County*, 19 Ark. 360.

As to swamp lands, this Court has held that the grants thereof imposed no trusts upon the state.

> *American Emigrant Co. v. Adams*, 100 U. S. 61.
> *Mills Co. v. Chi. etc. R. R. Co.*, 107 U. S. 557.
> *U. S. v. Louisiana*, 127 U. S. 182.
> *Hagar v. Reclamation Dist.*, 111 U. S. 701.
> *Cook v. Auditor*, 79 Mich. 100.

As to the other grants this Court has said:

> "It is a conclusive answer to the proposition we are now considering that the United States have no more claim, legal or equitable, touching the lands here in question, than they have to lands which they have sold and patented to others in the regular course of the administration of the Land Department of the Government; and that Congress has not seen fit, either expressly or by implication, to impose any restriction upon the taxing power of the state. That subject was remitted, as, under the circumstances, it might well be, wholly to their wisdom and discretion."
>
> *Tucker v. Ferguson*, 22 Wall. 527.

The moment it is held that the Constitution of Minnesota prohibits the exemption from taxation of any other than the enumerated classes of property, nothing remains on which an argument can be founded that granted lands can be excepted from

the operation of the constitutional rule. A plain case is then presented for the application of the doctrine that no exemption can be presumed.

> *N. O. C. R. R. Co. v. New Orleans,* 143 U. S. 192.
>
> "A state cannot strip itself of this most essential power by doubtful words. It cannot, by ambiguous language, be deprived of this highest attribute of sovereignty. This principle is distinctly laid down in each of the cases referred to. It has never been departed from."
>
> *Erie R. R. Co. v. Pennsylvania,* 21 Wall. 492.

But this question is fully and completely disposed of in *Tucker v. Ferguson, supra.* It was there, as here, contended that the state, as trustee of the United States, was at liberty to enter into any contract it deemed advisable regardless of the provisions of the State constitution. That contention was strongly pressed upon the consideration of this Court, and was met and overthrown. There the state constitution reserved the right to alter, amend or repeal all laws under which corporations were organized. It will be readily perceived that, so far as the right to act in effectuating the so-called trust is concerned, the question is the same whether arising under such a constitution or under that of the State of Minnesota. The argument in either case is that the constitution does not apply because the trust presents a case *sui generis* and not within the contemplation of the constitution.

In *Tucker v. Ferguson*, it was urged by counsel in their brief that the State, as trustee, *had an interest in the lands inconsistent with taxation;* that it could and did enter into an indefeasible contract "that none but specific taxes should be imposed," and that the repeal of the act whereby the contract was made impaired its obligation.

In answer to such contention this Court there said:

> "The state accepted the grant subject to all the conditions prescribed. She thereupon became the agent and trustee of the United States. The powers and duties with which she was clothed might all have been discharged by private individuals. The characters of sovereign and trustee were united in the same party. The State did not in anywise abdicate her sovereignty by accepting the trust, but the former might be exercised to render more effectual the discharge of the latter. She was in nowise fettered, except as she had agreed to fulfill all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be ultra vires and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further. Upon general prin-

ciples she could not tax the land while the title remained in the United States, nor while she held them as the trustee of the United States, which, in the view of the law, was the same thing. But when the state, proceeding in the execution of the trust, had transferred her entire title to the company,,and they had perfected their title and acquired the right to sell, the case assumed a very different aspect."

If the contention is sound here it must have prevailed there. We submit that the question is foreclosed by the decision in that case.

The legislature is no where given authority in disposing of them to enter into a contract whereby exemption or a commutation of taxes is secured. Such lands are not among the exceptions of Section 3 of Art. 9 of the Constitution either in terms or by implication. The constitution makes no exception in providing for the taxation of real property based upon ownership, or condition, except as provided in the said section. In order to sustain counsel's position, words must be imported into it which were never contemplated by its framers. The State *cannot* "bargain" in such wise, as to its "own public domain."

In this connection, counsel cite in support of their position the *Parcher Case, supra*. It is maintained that inasmuch as it involved a grant made subsequent to 1858 as well as the one previously made, it is therefore an adjudication that a contract could be made under the constitution exempting lands from taxation. The contention evinces a misconception of the decision in that case.

In the first place, the subject of the suit was the taxation of lands situate in the county of Wright in said state, which the Company had acquired under the Congressional grant of 1857, and the territorial grant of the same year. When the Court was discussing the question of taxation, (at p. 325 orig. ed.) referring to the Act of Congress of March 3, 1857, it says:

> "The plaintiff claims that certain lands (being part of the lands granted as aforesaid by Congress) which it has become the owner under the provisions of the *Act of May* 22, 1857, before referred to, and under subsequent legislation, not having been sold and conveyed by it, are exempt from taxation."

Again at the top of page 327, the Court say:

> "We can perceive no reason why such grant may not be a subject of legislation as *rightful* under a *territorial* as under a state grant."

There is no reference whatever to any grant made subsequent to 1858, nor is there any suggestion anywhere in the decision that lands acquired by a subsequent grant were involved. We have elsewhere called attention to the other cases decided by the Supreme Court of Minnesota, cited by counsel upon this branch of the case. We forbear repeating what is there said, but request that that portion of this brief be read in connection with this branch of the case.

VII.

Contemporaneous Construction.

To the contention that by long usage and acquiescence, the constitution has acquired a practical construction controlling upon the Court, we first reply that the question must be viewed in the light of the year 1871. Since the adoption of the amendment of that year, no occasion has arisen, nor could one arise, where anyone, whether official or otherwise, was called upon to determine the construction of the provision of Article 9 of the state constitution with reference to railroads, save, perhaps, those cases where was involved the question whether certain kinds of property came within the purview of the gross earnings tax. Gross earnings taxes upon railroad property were authorized by the amendment. Instead, therefore, of a case being presented in which there has been *forty years of practical construction,* the most that can be said is that such construction obtained for *a period of twelve years.* A line of cases is cited by counsel in which the Supreme Court of Minnesota has felt compelled to follow a long and well established practical construction. So also they cite, for the same purpose, a line of cases decided by this Court.

A reference to such cases will show that they announce no such doctrine as will authorize a departure in the case at bar from the plain meaning of the Minnesota constitution.

In *Carson v. Smith,* 5 Minn. 61, the Court call attention to the fact that many interests had arisen

under the statute which was assailed and that such fact would cause the court to hesitate long before overruling the statute. But the case was decided wholly upon other grounds.

In *Green v. Knife Falls Boom Co.*, 35 Minn. 161, arose the question whether a special act passed in 1872 conferring new powers upon a corporation was valid. Many similar acts had been passed which had been recognized by the "legislature or the *courts*." In 1871 the constitution was again amended so as to plainly prohibit such legislation. Say the Court:

> "This amendment * * * indicates a change of policy, and unquestionably inaugurates or restores the strict rule of construction as to all subsequent legislation affecting the charters of *existing* corporations."

In *City of Faribault v. Misener*, 20 Minn. 396, the question was whether a poll tax was valid. It had been provided for in numerous municipal charters and ordinances framed thereunder. "This long continued acquiescence of the people in the laws" was deemed decisive of the question. But, while the court so expresses itself, the case was decided upon another point, namely, that no provision had been made for collecting the tax.

In *Ames v. Lake Superior & M. R. Co.*, 21 Minn. 288, the question whether a special law incorporating the defendant was valid. The Court say:

> "We entertain some doubt whether, in this case, the legislature has not gone quite as far as

> strict construction would permit; but we do not feel that certainty of construction upon it, which, under the rules of interpretation by which courts must be governed in interpretating statutes in respect to their constitutionality, would authorize us to declare this act void."

In their reference to long legislative construction and popular acquiescence, it there remarks:

> "It is not meant by this that a clearly and obviously erroneous construction of the constitution may become controlling by legislative adoption, but that, *in a case of doubt*, the Court may and ought to resort for aid to the acts of the legislature and the people, in construing the provisions of the constitution alleged to have been violated."

In *State v. Moffett*, 64 Minn. 292, a statute had stood for thirty-six years which permitted to taxpayers a deduction from the gross amount of credits returned for taxation, the amount of their bona fide indebtedness. Not only had there been executive recognition of the validity of the statute for many years, but say the Court:

> "Again the validity of this statutory provision has always been taken for granted in the *judicial department* of the state government."

In *Stuart v. Laird*, 1 Cranch 299, it was argued that the judges of this Court had no right to sit as Circuit Judges. The Court say:

> "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer and has fixed the construction."

In *Martin v. Hunter's Lessee*, 1 Wheaton, 304 was involved the question whether the jurisdiction of this court extends to the final judgment of a state court. The court had no trouble in sustaining jurisdiction upon the plain language of the constitution, and say:

> "Strong as this construction stands upon the general language of the constitution, it may still derive support from other sources."

The Court then advert to a historical consideration of the subject, and further say:

> "This weight of contemporaneous exposition by all parties, this acquiescense of enlightened state courts, and other judicial decisions of the supreme court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremediable doubt."

In *Cohen v. Virginia*, 6 Wheat. 264, Mr. Justice Marshall, while discussing the 11th amendment with respect to the question of jurisdiction of the federal courts, adverts to the Judiciary Act, the Federalist, and "the uniform decisions of this Court," and says:

> "This concurrence of statesmen, of legislators and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction." (p. 421).

And further on the Chief Justice remarks:

> "Let the nature and objects of our Union be considered; let the great fundamental principles on which the fabric stands, be examined; and we think the result must be, that there is nothing so extravagantly absurd in giving to the court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require *that words which impart this power should be restricted by a forced construction.*"

In *Conley v. Port Wardens*, 12 How. 299, the Court decide the question wholly without reference to contemporaneous exposition, and the Court say:

> "We have not adverted to the practical consequences of holding that the state possesses no power to legislate for the regulation of pilots; though in our apprehension these would be of the most serious importance." (p. 321.)

In *Lithographic Co. v. Sarony*, 111 U. S. 53, the question was whether Congress had the power to protect photographs and their negatives by copyright. The Court admit that the "*question is not free from difficulty,*" and adverted to the copyright act of 1790 as an aid to the question. Mr. Justice Miller then adds:

> "We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs," etc.

This construction had been observed for nearly a century.

In The *Laura*, (*Pollock v. Steamboat Co.*), 114 U. S. 411, the question was the authority of the Secretary of the Treasury to remit penalties, *an authority which had been exercised for a century.* Indeed, as this Court there say, the question had been previously decided by the case of *U. S. v. Morris*, 10 Wheat. 246.

If, therefore, counsel are to depend upon the force of contemporaneous construction, they have failed to establish a rule in their support by the cases cited.

We maintain that the record does not present a case justifying the application of the rule of contemporaneous exposition. In the first place, the language of the constitution is not doubtful, and will be followed unless the most cogent reasons to the contrary countervail.

In 1895 the Supreme Court of Minnesota declined to follow a practical construction of the constitution of that state which had stood for 37 years.

State v. Sutton, 63 Minn. 147.

The doctrine is ably discussed by Judge Cooley in the following language:

> "Where, however, no ambiguity or doubt appears in the law, we think the same rule ob-

tains here as in other cases, that the court should confine its attention to the law, *and not allow extrinsic circumstances to introduce a difficulty where the language is plain.* To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers. 'Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.' While we conceive this to be the true and only safe rule, we shall be obliged to confess that some of the cases appear, on first reading, not to have observed these limitations. In the case of *Stuart v. Laird,* above referred to, the practical construction was regarded as conclusive. To the objection that the judges of the Supreme Court had no right to sit as circuit judges, the court say: 'It is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at rest. and ought not now to be disturbed.' This is certainly very strong language; but language very similar in character was used by the Supreme Court of Massachusetts in one case where large and valuable estates depended upon a particular construction of a statute, and very great mischief would follow from changing it. The court said that 'although if it were now *res integra,* it might

be very difficult to maintain such a construction, yet at this day the argument *ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words.' Language nearly as strong was also used by the Supreme Court of Maryland, where the point involved was the possession of a certain power by the legislature which it had constantly exercised for nearly seventy years.

"*It is believed, however, that in each of these cases an examination of the constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation,* and that the cases are not in conflict with the general rule as above laid lown. *Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it.* A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction

of the constitution. *We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed.*" *Cooley, Const. Lim.* 84, 86.

VIII.

The grant to Minneapolis and St. Cloud Rd. Co. does not contemplate that its granted lands shall be taxed by a gross earnings method.

The charter properly so-called of the company contained no stipulation as to taxation. (S. L. 1856, c. 160, as amended S. L. 1864, c. 5, S. L. 1865, c. 4.) The act under which its grant was bestowed was also silent upon the subject. S. L. 1865, c. 3.

The language whereby exemption is claimed, is as follows: S. L. 1870, c. 52. See act in full in early part of brief.

> "That in consideration of an annual payment of a per centum upon the gross earnings of the Minneapolis & St. Cloud Railroad, as herein provided, the road, its appurtenances and appendages, and all other property, estate and effects of the Minneapolis & St. Cloud Railroad Company which they have already acquired, or which they may hereafter acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal,

> repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all assessments and taxation, etc. * * * And the payment of such per centum annually as aforesaid shall be and is in full of all taxation and assessment whatever."

It would seem that by the terms of the act the percentage tax is restricted to property which the company "use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad," and its stock and capital. The method was to be "forever." We find no provision that the lands were to be taxed when sold and conveyed.

The rule that a case of exemption must be clearly shown, can find no more appropriate application than to the grant of the St. Cloud Co.

The language employed should not be extended beyond the fair meaning of its terms.

The exemption from ordinary taxation extends only to such lands as are held and used for the proper purposes of the corporation.

Bank v. Tennessee, 104 U. S. 493.
County of Ramsey v. Chicago, M. & St. P. Ry. Co., 33 Minn. 537.

This same provision was involved in

County of Todd v. St. Paul, M. & M. Ry. Co., 38 Minn. 163.

where it was held that it did not apply to large tracts of timber land purchased by the corporation.

Matter of Swigert, 119 Ill. 83.
State v. Commissioners, 23 N. J. L. 510.
Mil. & St. P. Ry. Co. v. City, 34 Wis. 271.

The lands owned by the Minneapolis & St. Cloud Co are described on page 21, Fourth Sub. of the Record.

That exemption cannot be predicated upon the fact that the stock and capital are expressly named would seem clear. Capital and stock have a well understood meaning.

Capital is the property or means contributed by the stockholders of a corporation.

Bailey v. Clark, 21 Wall. 284.

Capital stock in an act exempting the capital stock of a railroad from taxation does not include the property into which the capital has been converted.

Railroad Co. v. Gaines, 97 U. S. 697.

Nor are lands granted by Congress within such an act.

Railroad Co. v. Loftin, 30 Ark. 693.

In *Rd. Co. v. Shocklett*, 30 Mo. 550, the term was held to include the roadbed, machinery, depots, and other property used in operating the road, yet this was recognized as an unusual extension of its meaning.

Accumulated profits which have not been divided

among the stockholders, are not a part of the capital stock so as to be exempt from taxation.

Bank v. City of Milwaukee, 18 Wis. 281.

It is incredible that the legislature should have intended to exempt so important an element of the property of the company without clearly saying so.

IX.

The law of 1895 was fairly submitted.

Counsel suggests that the passage of the law was obtained by a cunning devise. This is based upon the form of the ballot employed in the statute.

It is evident that counsel were late in the discovery of the fact against which they now complain. It was not suggested in the former briefs filed and first found expression upon oral argument at the final hearing. It was never suggested in either of the state courts in any of the cases which have arisen since the submission of the act.

The suggestion that the form of the ballot was purposely made deceptive is wholly without foundation. The form of ballot was provided for in the law itself. It related to a subject which had ilicited extensive public discussion for several years in the legislature, by the public press, and elsewhere. Moreover, under a law of the state, the character of the act submitted was stated in the official synopsis of measures submitted to popular

vote which was posted in every election precinct in the state.

We confess surprise that counsel have been pleased to inject into this case a suggestion so unwarranted and baseless.

X.

The second clause of Section 9, specifying the classes of property which may be exempted, is exclusive of any further right of exemption.

A similar question arose in New Hampshire, where it was construed that under one provision of the constitution of that State the requisite power had been conferred to provide for the taxation of certain property. But the contention was answered as follows:

> "But if it is claimed * * * that the power of taxation is conferred by Article 2 of our constitution, which declares that 'the supreme legislative power in this state shall be vested in the senate and house of representatives, each of which shall have a negative upon the other; * * * it may be urged in reply, that, granting all the power of taxation is conferred by Article 2, it is limited and restricted by the terms of Articles 4 and 5, which follow. Those articles define, with great particularity, the power which may be exercised by the general court, and would seem to confer all the power required by that body to enable it 'to

provide for the necessary defense and support of the government, and the protection and preservation of the subjects thereof.' If Articles 4 and 5 were not understood and intended as restrictions and limitations upon the general power conferred by Article 2, it is difficult to understand why they were inserted. They were unnecessary, for they do not enlarge the power of the general court as conferred by Article 2, and unless they may be treated as restrictions they are useless. If they are restrictions, it might be suggested that the whole power of taxation is contained in that part of Article 5 which authorizes the levy of proportional and reasonable taxes on all inhabitants and residents of and estates within the state; and that they restrict the power not only to the manner of the levy, but to the subjects upon which it can be exercised, viz: persons and estates."

State v. Express Co., 60 N. H. 241.

It is not uncommon to find a grant in indefinite general terms, limited and explained by a subsequent enumeration of particulars; and when such enumeration is clearly and explicitly made, it must be construed to control the general terms, for otherwise it will be merely idle and nugatory. *Opinion of Justices,* 4 N. H. 565.

In a constitution, the great purpose of which is to define and limit the powers of government, it cannot be supposed that the power to levy and assess taxes would be granted to the legislature without any obligatory restraint on its exercise. No power is capable of greater abuse, or can be

made more oppressive and odious in practice. Of this the framers of the constitution and their contemporaries have had abundant experience and knowledge. Nor can we doubt that by the use of words in the constitution the natural import of which is to put a limit on the exercise of this power, they intended them to have that operation and meaning.

Oliver v. Washington Mills, 11 Allen, 268.
Taylor v. Chandler, 56 Tenn. 366.
City of Zanesville v. Auditor, 5 Oh. St. 593.
Fletcher v. Oliver, 25 Ark. 289.
C. & O. R. R. Co. v. Miller, 19 W. Va. 408.
Hogg v. Mackay, 31 Pac. 780.
Northwestern University v. People, 99 U. S. 309.

XI.

The act of 1895 is amendatory of the several acts under which the railroad companies in question claim exemptions, within the meaning of the amendment of 1871.

The objection urged to the form of the act of 1895 is evidently based upon a misconception of the nature of the amendment.

Any law which in its necessary operation modifies or changes the legal effect of the several acts in question, amends them. The act of 1895 removes from their operation the granted lands, and hence is *pro tanto* amendatory in its character within the

meaning of the constitutional amendment. There is no restriction in the amendment as to the manner in which the legislature was to act upon the subject. The only limitation which is imposed upon the legislature is that whatever law is passed shall, before becoming effective, be ratified by a popular vote.

XII.

Authority to prescribe a form of taxation appropriate to a given business, like a per centum tax upon the gross earnings of a railroad company, does not imply authority to contract away the right of taxation, wholly or in part.

The infirmity of the argument of the plaintiff in error consists in assuming, *first,* the existence of a legislative authority to contract, and, *second,* that the gross earnings method was intended to be a contract, both of which propositions are denied by the defendant in error. Conceding for the purposes of argument only, that under the Minnesota constitution a gross earnings method of taxation is permissible, we contend that, save for the effect of the constitutional amendment of 1871, the legislature is at liberty to change the rate at any time, as justice may require ,or to wholly abrogate the method whenever, in its judgment, it shall be deemed advisable. The method adopted does not rest in contract, but springs from legislative power, and may be withdrawn.

Tucker v. Ferguson, 22 Wall. 528.
West Wis. Ry. Co. v. Brd of Supervisors, 93 U. S. 595.
Pennsylvania College Cases, 13 Wall. 190.
Bailey v. Maguire, 22 Wall. 217.
Railway Co. v. Philadelphia, 101 U. S. 529.
Salt Co. v. E. Saginaw, 13 Wall. 375.
R. R. Cos. v. Gaines, 97 U. S. 697.
N. Orleans C. & L. R. Co. v. N. Orleans, 143 U. S. 192.

XIII.

Assuming that a gross earnings tax is a legitimate exercise of the taxing power, and that no contract right was acquired by virtue of the special laws in question, it follows that the question is not at all embarrassed by the fact that under the said laws the gross earnings taxes were in lieu of other taxation upon both the granted lands and other property of the railroad companies.

It was clearly within the power of the legislature to subject the granted lands to the ordinary method of taxation. Nor is it material that in the act submitted to and ratified by the people of the State effecting such a change of policy, no reduction was made or authorized in the existing rate. Whether the rate as applied to the property essential to the operation of the railroad be or be not excessive, or unjust, is not a judicial question. All such ques-

tions must be addressed to the legislature rather than to the Court.

Nathan v. Louisiana, 8 How. 82.
McCulloch v. Maryland, 4 Wheat. 419-425.
Providence Bk. v. Billings, 4 Pet. 563.
People v. Flagg, 46 N. Y. 401.
Merriwether v. Garrett, 102 U. S. 472.
Kirtland v. Hotchkiss, 100 U. S. 491.

XIV.

Under Article IX, Section 1, of the Constitution of Minnesota, prescribing a rule of equality and uniformity, the Legislature was prohibited from taxing the lands of railroad companies at a less rate, or by any other rule, than that by which similar property of owners was taxed.

The reason which justifies the adoption of a gross earnings tax as to ordinary railroad property, i. e., property which is essential to the operation of the business of a railroad company, repudiates the taxation of land acquired by grant by the same rule.

Even under laws where the property of a railroad company was deemed exempt, the courts, with marked unanimity of opinion, have held that the exemption did not extend to all property of the company regardless of the purposes for which it was held or the uses to which it was devoted.

State v. Newark, 26 N. J. L. 519.
Cooley on Taxation, 151.

County of Ramsey v. C., M. & St. P. Ry. Co., 33 Minn. 537.
County of St. Louis v. St. P. & D. R. R. Co., 45 Minn. 510.
25 *Amer. & Eng. E. of L.*, 162, note 2, citing numerous cases.

The same strictness of rule obtains against relieving any owner of a given class of property of his just proportion of the tax, even where it is held that the legislature may exempt the class.

Bright v. McCullough, 27 Ind. 223.
Dailey v. Snap, 47 Miss. 387.
Palmer v. Strump, 29 Ind. 329.
People v. Whyler, 41 Cal. 351.
Portland Bank v. Anthorp, 12 Mass. 252.
State v. Express Co., 60 N. H. 242.
City of Zanesville v. Auditor, 5 Oh. St. 593.
Loftin v. Citizen's Nat. Bank, 85 Ind. 341.

Such provisions are intended to prohibit discrimination in favor of or against persons and classes, either of persons or of property.

Lehigh Iron Co. v. Lower, 81 Pa. St. 482.
Fletcher v. Oliver, 25 Ark. 289.
Primm v. Belleville, 59 Ill. 142.
Youngblood v. Sexton, 32 Mich. 406.
People v. Weaver, 100 U. S. 539.
Ger. Nat. Bank v. Kimball, 103 U. S. 732.

Corporations fall within the purview of such provisions as well as private individuals and all other subjects of taxation.

Clark v. Mibit, 67 Ala. 217.
Ottawa Gas Light Co. v. Downey, 127 Ill. 201.
Davenport v. Chi. etc. R. Co., 38 Ia. 633.

Conformity to their requirements is an indispensible prerequisite to the validity of a tax imposed in a State when such a provision is in force.

Sleight v. People, 74 Ill. 47.
People v. Henderson, 12 Col. 369.
Northampton v. Hampshire Co., 145 Mass. 108.
State v. Cumberland, etc., R. Co., 40 Md. 22.
Wis. Cent. R. Co. v. Taylor, 52 Wis. 37.

Taxes are equal and uniform when all within the limits of the district share equal benefits therefrom, or when they are imposed uniformly upon all property or things of the same description.

Smith v. Aberdeen, 25 Miss. 458.
Palmer v. Stumph, 29 Ind. 329.
Morris v. Waco, 57 Texas 635.
Dyar v. Farmington, 70 Me. 515.

Conclusion.

To summarize the contentions urged on behalf of the defendant in error, we say:

1. That the exemptions claimed on behalf of the several railroad companies whose lands are involved in this suit, are based upon statutes enacted subsequent to the adoption of a constitution by the State in 1858.

2. That that constitution, as held by the Court below, prohibited the legislature from contracting

away, wholly or in part, the right to tax the said lands and that they could not lawfully be taxed otherwise than by the rule of uniformity therein provided.

3. That the amendment to the constitution of that State in 1871 operated as a *temporary validation* of the several statutes in question providing for a per centum method of taxation.

4. That such method of taxation was subject to change at any time when effected in the manner provided by the said amendment.

5. That the percentum method of taxation is not a contract at all, but a system of taxation which rests in and derives its force from the sovereign will as expressed in the said amendment.

6. That it necessarily follows from the foregoing postulates, that the lands in question might be brought under the general and ordinary method of taxation, without affecting, so far as this Court is concerned, the question as to the manner in which the remaining properties of the said companies should be taxed, that being a question of purely state policy, the validity of which must be determined, if at all, in other, than the present, litigation.

7. That the right of exemption must rest upon clear and express provisions of law unembarrassed by any question of doubt, and that doubt is fatal to it.

West Wis. R. Co. v. Board of Supervisors, 93 U. S. 595.

8. That the grants to the State by Congress,

whether as to swamp or other lands, were not intended to, nor did they, operate to clothe the legislature with the power to stipulate away the sovereign right of taxation as to such lands; for to concede that the power existed to exempt such lands from taxation for any time carries with it the power to so exempt them for all time. There is no halting place between the power to provide for temporary and perpetual exemption.

West Wis. R. R. Co. v. Board of Supervisors, 35 Wis. 267, citing *Washington University v. Rouse, supra.*

9. That it is, at best, a harsh doctrine that a legislature can in any case contract away the sovereign power of taxation, and it should therefore be restricted to those cases where the claim rests upon clear and unmistakable terms.

For such reasons, it is respectfully submitted, that the judgment of the State Supreme Court should be affirmed.

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Attorneys for Plaintiff in Error.

No. 20.

FILED
OCT 12 1900
JAMES H. MCKENNEY,
Clerk

Supp. Brf. of Douglas & Childs

IN THE

SUPREME COURT

OF THE UNITED STATES.

Filed Oct. 12, 1900.

OCTOBER TERM, 1900.

NO. 20.

FRED STEARNS, AS COUNTY AUDITOR OF AITKIN COUNTY, MINNESOTA,

Plaintiff in Error,

against

STATE OF MINNESOTA, ON THE RELATION OF JAMES N. MAHR,

Defendant in Error.

Supplemental Brief for Defendant in Error.

W. B. DOUGLAS, Attorney-General,
and
H. W. CHILDS,
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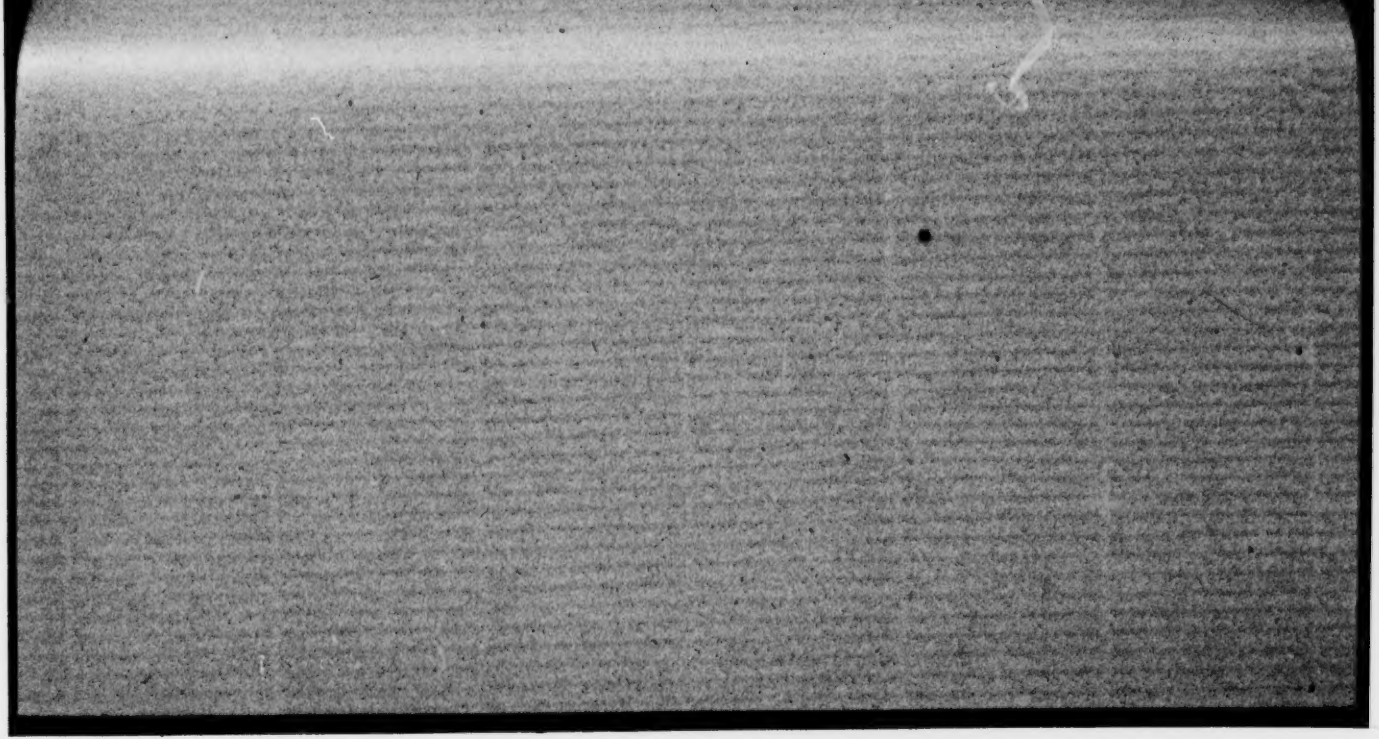

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 20.

FRED STEARNS,
as County Auditor
of Aitkin County, Minnesota,
Plaintiff in Error,
AGAINST
STATE OF MINNESOTA,
on the Relation of James N. Marr,
Defendant in Error.

Supplemental Brief for Defendant in Error.

THAT THE ACCEPTANCE OF CHAPTER 8 OF THE SPECIAL LAWS OF MINNESOTA FOR THE YEAR 1865 BY THE ST. PAUL AND DULUTH, AND THE NORTHERN PACIFIC RAILROAD COMPANIES DID NOT CONSTITUTE CONTRACTS IN FORM BETWEEN THE STATE OF MINNESOTA AND SUCH COMPANIES.

I.

Counsel for Plaintiff in Error call attention to the language

of Mr. Justice Mitchell in *State versus Luther, 56 Minn., 164,* wherein it is stated, referring to Chap. 8 of the Laws of 1865:

"The effect of this by necessary implication was that until the sale or lease the lands were to be entirely exempt from taxation in the ordinary way."

The learned counsel overlook the fact that upon rehearing, in the decision reported on the page following, the Court expressly overruled the language quoted. The Court therein say: "But inasmuch as an *obiter* remark in the opinion might be understood to mean that acts providing for a commuted system of taxing *railroad property and granted lands* constitute contracts between the State and the railroad companies which cannot be repealed or amended, it is proper to say that no such question was before the Court, and that the remark referred to was not intended to express or intimate any opinion on that point."

II.

The strict rule of construction applicable to grants creating exemption from taxation is fully illustrated and summarized in the decision of this Court in Vicksburg, etc., Railroad Company against Dennis, 116 U. S., 668, wherein the Court speaking by Mr. Justice Gray, say:

"In Philadelphia and Wilmington Railroad Company against Maryland, 10th How., 376, Chief Justice Taney said, 'This Court, on several occasions, has held that the power of the State is never presumed to be relinquished unless the intention to relinquish is declared in clearly unmistakable terms.'

In subsequent decisions the same rule has been strictly applied. It has been said "that neither the right of taxation nor any other power of sovereignty will be held by this court

to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken." Also, that exemption from taxation should never be assumed "unless the language used is too clear to admit of doubt. "That such exemption was regarded as in abrogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact expressed requirements of the grants construed *strictissimi juris*."

In that case the Court had before it a clause in the charter of the Vicksburg Company, reading as follows: "The capital stock of said company shall be exempt from taxation, and its road, fixtures, workshops, warehouses, vehicles of transportation, and every appurtenance shall be exempt from taxation *for ten years after completion of said road within the limits* of the State."

The Court held this language must be construed as not preventing the taxation of the road, fixtures, and appurtenances, *prior* to the completion of the road. That if the legislature had so intended it would have used in the charter the term "*until* ten years" after completion instead of "for ten years."

So for purposes of taxation, in Ford against Delta Pine Land Company, 164 U. S., 666, this Court held that "the capital and all the property and effects of said Company" did not include lands acquired which are not necessary for the construction, operation, and equipment of its railroad.

In 1833 the legislature of Pennsylvania passed an act providing that "the real property, including ground rents, now belonging to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to said hospital, shall be and remain free from taxes."

In 1853 a law was passed which subjected the ground rents to taxation. It was insisted that the act of 1833 constituted an irrevocable contract. But this Court held otherwise, affirming the Supreme Court of Pennsylvania—*Christ Church*

Hospital vs. *The County of Philadelphia*, 24 Howard, 301, approved in *Tucker against Ferguson*, 22 Wallace, 574.

Tested by the strict rules of construction above noted, it is submitted that the acceptance of the taxation enactment of March 3, 1865, known as Chap. 8, of the Special Laws of Minnesota for 1865, did not constitute an irrevocable contract involving the subject of taxation, or creating a partial immunity therefrom, between the State of Minnesota and the St. Paul & Duluth and the Northern Pacific Railroad Companies.

The enactment in question was not a part of the original grant to the Duluth Company made by Chap. 2 of the Special Laws of 1865, but was a separate and distinct provision. This exemption, which is claimed to be an irrevocable contract, reads: "Provided that said Company * * * shall, from and after the expiration of said seven years, on or before the first day of March of each and every year, pay into the treasury of this State three per cent. of the gross earnings of said railroad, and the payment of such percentum annually as aforesaid shall be, and is in full, of all taxation and assessment whatever."

Particular attention is called to the fact that this provision does not contain the words *forever exempt*, which were included in the Territorial enactment of 1857, before the Court in the Parcher case, reported in 14 Minn., 325, and other cases cited by counsel in their brief.

The latter provision there quoted reads as follows:

"And in consideration of such annual payments the said Company *shall be forever exempt* from all assessments and taxes whatever by the Territory, or State which shall succeed the Territory, * * and said land granted by said act of Congress, hereby authorized to be conveyed to said Minnesota & Pacific Railroad Company, shall be exempt from all taxation whatever until sold and conveyed."

The Court, after quoting the act in full, adds (page 325):

"The other act in relation to the taxation of these lands, approved March 4, 1865, we do not deem it necessary to consider in this case."

The omission of the words '*forever exempt*' or words of like import from the act which forms the basis of the pretended irrevocable contract clearly indicates that the sovereign power of taxation was not granted away.

W. B. DOUGLAS.
H. W. CHILDS,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 20.—October Term, 1900.

Fred Stearns, as County Auditor of Aitkin County, Minnesota, Plaintiff in Error, *vs.* The State of Minnesota on the Relation of James N. Marr.	In error to the Supreme Court of the State of Minnesota.

[December 3, 1900.]

This case comes on error to the Supreme Court of the State of Minnesota, is brought here at the instance of certain railroad companies, and involves the question whether the real estate belonging to them, and not used in the operation of their roads, is subject to taxation according to its value, or is excepted from such ordinary rule of taxation by virtue of a contract alleged to have been made many years ago by legislation of the State, to the effect that railroad companies should pay a certain per cent. on their gross earnings in lieu of taxes on all their property.

The facts are as follows, and first as to lands belonging to the St. Paul and Duluth Company:

The Constitution of Minnesota, adopted in 1858, has always contained these provisions (Article IX, sections 1 and 3):

"Sec. 1. All taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the State."

"Sec. 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money; but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation."

On May 23, 1857, by the territorial legislature of Minnesota, the Nebraska and Lake Superior Railroad Company was organized. (Laws Minn. 1857, ch. 93, p. 323.) By an act of the State legislature, of date March 8, 1861, the name of this company was changed to the Lake Superior and Mississippi Railroad Company. (Laws Minn. 1861, p. 201.) By this act certain of the swamp lands granted to the State by the act

of Congress of September 28, 1850, (9 Stat. 519,) were granted to that company to aid in the construction of its railroad. The St. Paul and Duluth company is the successor in interest of that company, and has succeeded to all its rights, privileges, immunities and property. By act of Congress, of date May 5, 1864, (13 Stat. 64,) as amended July 13, 1866 (14 Stat. 93,) lands were granted to the State of Minnesota to aid in building a railroad from the city of St. Paul to the head of Lake Superior. The first section declaring the grant reads: "That there be, and there is hereby, granted to the State of Minnesota for the purpose of aiding in the construction of a railroad in such State from the city of St. Paul to the head of Lake Superior, every alternate section of public land," &c. Section 5 reads:

"That the said lands hereby granted when patented to said State, shall be subject to the disposal of said State for the purposes aforesaid, and for no other; and the said railroad shall be and remain a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States."

On February 23, 1865, the legislature of Minnesota passed an act accepting the grant, and transferring the lands to the predecessor of the St. Paul and Duluth Railroad Company. (Special Laws Minn. 1865 chap. 2, p. 19.) The first section, after accepting the lands granted, reads:

"And the same are hereby granted, vested in, and transferred to the Lake Superior and Mississippi Railroad Company, its successors and assigns to be held, used or sold and disposed of by said railroad company, to aid in the construction of a railroad, as contemplated and provided by said act of Congress, and for the equipment and operation of the same, and for no other purpose whatever, the same to be held, used, and disposed of upon and subject to the conditions in said act of Congress provided, and upon the conditions in this act contained. That in consideration of land granted by this act, and of the lands, rights, privileges and franchises which have heretofore been granted to said railroad company, the said company shall, on or before the first day of March of each and every year after said railroad is completed and in operation, pay into the treasury of the State three per cent. on the gross earnings of said railroad which sum shall be in lieu and in full of all taxation and assessments upon the said railroad, its appurtenances and appendages, and all other property of said company, real, personal and mixed, including the lands hereby and heretofore granted to said company, or so intended to be granted. Provided, however, that the lands hereby and heretofore granted to said company shall be subject to like lands of individuals, to be taxed as fast as the same are sold or conveyed, or contracted to be sold, or are leased by said company, or the stumpage upon any lands is sold or contracted to be sold by said company; but no mortgage or trust deed executed by said company upon said lands shall, for the purpose of taxation, be construed as such sale, conveyance, lease or contract of sale."

Eight days thereafter, and on March 3, 1865, an act amendatory of this act was passed. (Special Laws 1865, chap. 8, p. 45.) The first section of this act is as follows:

"1. That whenever any lands heretofore or hereafter granted to the Lake Superior and Mississippi Railroad Company to aid in the construction or completion of its road or branches shall be contracted to be sold, conveyed or leased by said company, the same shall be placed upon the tax list by the proper officer for taxation as other real estate for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made, but in enforcing a collection of the taxes thereon, the title or interest of the said company or of any trustee or mortgagee thereof shall be in nowise impaired or affected thereby, but the improvements thereon and all the interest of the purchaser or lessee therein may and shall in case of default in the payment of taxes upon such land, be sold to satisfy the same, and it shall be the duty of the proper officers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes, and that the provisions of the several acts in relation to the taxation of the lands of said company, so far as the mode of taxing such lands conflict with the provisions of this act, shall be and they are repealed. Provided, that said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March in each and every year, pay into the treasury of the State one per cent. on the gross earnings of said railroad, the first payment to be made on the first day of March next after thirty miles of said railroad shall be completed and in operation, and shall, during the seven years next ensuing after the expiration of the three years aforesaid, pay into the treasury of this State, on or before the first day of March of each and every year, two per cent. of the gross earnings of said railroad, and shall, from and after the expiration of said seven years, on or before the first day of March of each and every year, pay into the treasury of this State three per cent. of the gross earnings of said railroad; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessment whatever."

The second section provided for acceptance of the provisions of the act by the railroad company; that when accepted "the same shall become obligatory upon the State and upon said company;" and they were accepted. Thereafter, as admitted, the railroad was constructed by the company "in reliance upon said act." Taxes were paid by the railroad company on its property in accordance with the terms of this alleged contract until 1895, and during those years the State made no attempt to levy any taxes upon these lands. In 1871 the following amendment to the State constitution was by vote of the people duly adopted (Laws Minn. 1871, p. 41):

"Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this State or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon

their real estate, roads, rolling stock and other personal property at and during the time and periods therein specified, pay into the treasury of this State a certain per centum therein mentioned of the gross earnings of such railroad companies now existing, or hereafter organized, shall, before the same shall take effect or be in force, be submitted to a vote of the people of the State, and be adopted and ratified by a majority of the electors of the State voting at the election at which the same shall be submitted to them."

In November, 1896, this statute passed in 1895, (Laws 1895, p. 378,) was adopted by the people:

"SEC. 1. All lands in this State heretofore or hereafter granted by the State of Minnesota or the United States or the Territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this State, except such parts of said lands as are held, used or occupied for right of way, gravel pits, side tracks, depots and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies. Provided, that said railroad companies shall continue to pay taxes into the State treasury upon their gross earnings in the same manner and in the same amount as is now provided by law, and that nothing in this act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands.

"SEC. 2. Such portion or portions of any act or acts, general or special, of the State or Territory of Minnesota heretofore enacted which provides or attempts to provide for any exemption of lands hereby declared taxable, from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this State, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

"SEC. 3. If this act shall be held to be void, so far as it applies to the land of any particular railroad company in this State, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated."

Under these provisions the State proceeded to levy taxes upon the lands of the St. Paul and Duluth Company, and the validity of such taxation is the question involved.

Lands belonging to the Northern Pacific Railway Company are also involved in this litigation, and the facts in reference to those lands are these: On July 2, 1864, the Northern Pacific Railroad Company was chartered by an act of Congress to build a railroad from Lake Superior to the Pacific, and received a grant of public lands to aid in the construction thereof. The lands thus granted are those in respect to which the question of taxability arises. (13 Stat. 365.) By section 17 of that act the company was authorized to accept "any grant, donation, loan, power, franchise, aid or assistance which may be granted to or conferred upon said company by the Congress of the United States, or by the legislature of any State, or by any corporation, person or persons; and said corporation is

authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid or assistance, to its own use, for the purpose aforesaid."

By section 18 it was required to obtain the consent of the legislature of any State through which, in the operation of its road, it might pass previous to commencing work. Such consent was obtained from Minnesota by an act of the legislature of that State, approved March 2, 1865. (Laws 1865, p. 224.) On March 4, 1870, the legislature of Minnesota passed an act, (Special Laws Minn. 1870, p. 338,) the first and second sections of which are as follows:

"SEC. 1. That the lands, franchises, property, stock and capital of the Northern Pacific Railroad Company shall be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and shall be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property and franchises of the Lake Superior and Mississippi Railroad Company, as is provided in and by an act entitled 'An act in relation to the taxation of lands granted to the Lake Superior and Mississippi Railroad Company,' approved March third, eighteen hundred and sixty-five. Provided, however, That the gross earnings of said railroad company on which a percentage is to be paid to the State shall include only the earnings of that portion of the Northern Pacific Railroad constructed and operated by said company within the limits of this State.

"SEC. 2. That said Northern Pacific Railroad Company shall have the right and authority to acquire and hold lands for right of way, depot grounds and for all necessary purposes of said company in all respects as provided by the general laws of this State, as set forth in sections numbered consecutively thirteen to twenty-seven, inclusive, of chapter thirty-four, title one, of general statutes now in force. But where said company proceeds to condemn private property in more than one county in the same proceedings, the commissioners to be appointed shall be residents of the county where the property to be taken is situated, or of the county to which such county is attached for judicial purposes. And there is hereby granted to the Northern Pacific Railroad Company the right of way through and over any lands of this State to the same extent as is granted by act of Congress through and over the public lands to said company."

This act was duly accepted by the Northern Pacific Railroad Company. Thereafter its road was constructed, and up to the act of 1895, *supra*, taxes were levied and paid in the manner prescribed. The validity of taxes levied upon the lands of this company since the act of 1895, and under the authority of that act, is challenged, and becomes in this litigation one of the questions involved.

Lands belonging to the Great Northern Railway Company were also involved in the litigation in the State courts, but that company is not here making any contention for a reversal of the judgment of the State Supreme Court.

After the act of 1895, approved by the vote of the people, proceedings were instituted to enforce the levy of taxes on the lands of these railroad

companies, and the proceedings thus instituted are those which are now before us. The decision of the Supreme Court of the State was adverse to the railroad companies, (72 Minn. 200,) and the case is here on error to that judgment.

Mr. Justice BREWER delivered the opinion of the Court.

The Supreme Court of Minnesota held that the contract alleged to have been made with the railroad companies for a per cent. of the gross receipts in lieu of all taxation upon their property was, in view of the provisions of sections 1 and 3 of article 9 of the State constitution, one beyond the power of the legislature to make. We quote from its opinion:

"The language of the constitution is clear, exact and imperative. It requires that all property not exempt must be taxed, and that the basis of such taxation must be the cash value of the property.

* * * * * *

"It may be true, as claimed, that a gross earnings tax (if subject to amendment) is only another mode of arriving at equal taxation, and that such a system of commuted taxation of the property of railway companies and similar corporations is of great practical and material advantage to the State; but the fact remains that the taxation of all property upon the basis of its cash value was the sole rule ordained by the constitution to secure equality and uniformity of taxation.

* * * * * *

"We hold that the statutes under which it is claimed that the lands in question are exempt from taxation in the ordinary way, upon the basis of their cash valuation, were unconstitutional when enacted, and remained so until validated by the constitutional amendment of 1871. The legal effect of such amendment was to validate them. (*State* v. *Luther*, 56 Minn. 156.)

"But this ratification or validation of the statutes was a qualified one, and the right to repeal or amend them was reserved by necessary implication, provided such repeal or amendment was adopted and ratified by a majority of the electors.

"Our conclusion is that Laws 1895, chapter 168, does not impair the obligation of any contract between the State and railway companies, and that the lands here in question are taxable in the ordinary way, as other lands are taxable."

The Federal question thus suggested is the single one for consideration. Was there a valid contract created by the legislation providing for the taxation of all railroad property (lands included) on the basis of a per cent. of the gross earnings, which was impaired by the legislation of 1895, withdrawing the lands from this arrangement, and directing their taxation according to their actual cash value? And, first, as to the St. Paul and Duluth Company: That a contract was attempted to be made is obvious. The State, as trustee, held certain swamp and railroad lands. It proposed to give them to the company, subject to taxation in a certain way, if the company would construct the railroad. The company accepted

the proposition and constructed the road. Thus, if the parties were competent to enter into such an arrangement, a contract was made. While some of the lands, the swamp lands, were granted to the State for a purpose other than railroad construction, they were granted in trust, and it has long since been settled that Congress alone can enquire into the manner in which the State executed that trust and disposed of the lands. (*Emigrant Co.* v. *County of Adams*, 100 U. S. 61, 69.)

With respect to the Northern Pacific Railroad Company, the facts are slightly different, but the State legislation in respect to it was of a character to place its land grant in the same condition, so far as the question of contract is concerned. For the land grant to the company became operative within the limits of a State only when such State consented to the construction of the road. The power to consent carried with it the power to determine the conditions upon which such consent should be granted, and when the State of Minnesota said that the Northern Pacific Railroad Company might construct its road through the State, and might accept the provisions of the Congressional grant, and prescribed the conditions upon which such road should be constructed and such grant should be taken, the effect of such legislation is the same as though the State received the grant and transferred it to the company on those conditions. It said in substance that, though the land was not given to the State to be transferred to a railroad company, (and in that case the State might have prescribed the conditions of the transfer,) it was given to the company subject to the assent of the State, and the State's assent to the gift was upon the conditions it named. The offer thus made by the State was accepted, and in reliance thereon the road was constructed.

Of course, withdrawing any portion of the property protected by the three per cent. commutation, and subjecting that to ordinary taxation, leaving the three per cent. still due from the railroad companies, changes materially the terms of the alleged contract, so that there can be no question that if there were a valid contract created by the earlier legislation, the act of 1895 impairs its obligation. The general rule of this court is to accept the construction of a State constitution placed by the State Supreme Court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a State, through its legislation, to make an alleged contract, and the meaning and validity of such contract, were matters which in discharging its duty under the Federal Constitution it must determine for itself; and while the leaning is towards the interpretation placed by the State court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract.

In *Douglas* v. *Kentucky*, (168 U. S. 488,) this question was considered at length, and, by Mr. Justice Harlan, after a review of some prior cases, the conclusion was thus stated (p. 502):

"The doctrine that this court possesses paramount authority when reviewing the final judgment of a State court upholding a State enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or non-existence of the contract set up, and whether its obligation has been impaired by the State enactment, has been affirmed in numerous other cases. (*Ohio Life Ins. Co.* v. *Debolt*, 16 How. 416, 452; *Wright* v. *Nagle*, 101 U. S. 791, 794; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Vicksburg, Shreveport &c. Railroad* v. *Dennis*, 116 U. S. 665, 667; *N. O. Waterworks Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 36; *Bryan* v. *Board of Education*, 151 U. S. 639, 650; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 493; *Bacon* v. *Texas*, 163 U. S. 207, 219.)"

See also *McCullough* v. *Virginia*, (172 U. S. 102, 109;) *Walsh* v. *Columbus, Hocking Valley & Athens Railroad Company*, (176 U S. 469.)

As a preliminary matter, it is worthy of note that the alleged invalidity of this contract, in respect to taxation, was not complained of for thirty years. Whether the revenues of the State were benefited or injured by this method of taxation we are not advised, but it does appear that neither party challenged it. Both the railroads and the State accepted and acted under it for nearly a third of a century. It may be well to notice the decisions of the Supreme Court of Minnesota prior to the one challenged in this proceeding. In *Railroad Company* v. *Parcher*, (14 Minn. 224,) it appeared that a railroad charter had been granted by the territorial legislature, containing, among other things, a provision similar to the one in question, commuting all taxes on the basis of three per cent. on the gross earnings. The company having defaulted in its contract, foreclosure proceedings were had, and its property, franchises, &c., were bought in by the State. All this was done in pursuance of express statutory provisions. Thereafter an act was passed transferring to a new corporation all the property, franchises, &c., acquired by this foreclosure, and the question presented was whether this new company was entitled to the three per cent. commutation. And it was held that it was. The opinion of the court was, that by the foreclosure proceedings the State acquired, without any merger, all the franchises and privileges held by the territorial corporation, and that it could transfer them to a new corporation of its own creation. We do not stop to question the argument of the Supreme Court to the effect that there was no merger. All that we deem necessary to notice is that the State by the foreclosure proceedings acquired title to property—railroad property, including lands granted to aid in construction—and, having that property could dispose of it free from any limitations imposed by the constitutional provisions which are now

referred to as invalidating the present alleged contract. In other words, the State could take and dispose of lands upon precisely the same terms which it took and disposed of the lands to the present plaintiffs in error.

This decision was recognized and reaffirmed in *St. Paul* v. *Railroad Company*, (23 Minn. 469, 475,) in which it was said:

"Upon the renewal of the grant, in 1864, to the present company, it was therefore clearly competent for the legislature to change and modify its terms and conditions, so as to require the annual payment of a different rate per cent. of the gross earnings of the road, to commence upon the completion of thirty instead of fifty miles, and, in consideration of such annual payment, to exempt the railroad, its appurtenances, and other property, from all taxation, and from all assessments, both general and local. This modification of the original contract was prohibited by no provision of the constitution; and the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since, as valid, by both the executive and legislative departments of the State government, but, by an express constitutional amendment, adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by a vote of the electors of the State."

See also *County of Stevens* v. *Railway Company*, (36 Minn. 467, 470,) in which is this declaration:

"That the exemption from ordinary taxation, created in 1857 in favor of the Minnesota and Pacific Railroad Company, subsequently passed with the lands, and as a right appendant thereto, to the St. Paul and Pacific Railroad Company and to the First Division of the St. Paul and Pacific Railroad Company, may be now accepted without question. It was so decided eighteen years ago in the case of the last-named company v. *Parcher*, (14 Minn. 224, 297,) which decision has been ever since followed. (*State* v. *Winona & St. Peter R. R. Co.*, 21 Minn. 315; *Minnesota Central Ry. Co.* v. *Melvin*, Id. 339; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Pfaender*, 23 Minn. 217; *City of St. Paul* v. *St. Paul & Sioux City R. R. Co.*, Id. 475; *County of Nobles* v. *Sioux City & St. Paul R. R. Co.*, 26 Minn. 294; *State* v. *Northern Pacific R. R. Co.*, 32 Minn. 294.)"

And also *State* v. *Luther*, (56 Minn. 156, 162, 163, 164,) decided 1894, in which the court said:

"The system of providing for the payment of a percentage of the gross earnings of the road in lieu of all other taxes on 'railroad property' and on the lands granted to aid in its construction, while owned by the company, was inaugurated by the territorial legislatures, and was universally in vogue at the date of the adoption of the constitution.

"And after that date the State legislatures invariably assumed that they continued to possess the power to adopt this system of commuted taxation when granting lands to aid in the construction of a railroad, whether such lands were the absolute property of the State, or were held by it in trust for that purpose under an act of Congress. This was the practice, not only as to old grants made before the adoption of the constitution, but also as to new grants, both State and Congressional, made after that date."

And then, after referring to a number of grants by Congress and the State, added:

"In brief, the legislature assumed that when making a grant of lands to aid the building of a railway, or in executing the trust where lands had been granted to the State by Congress for the same purpose, (and which, while thus held by the State, either as proprietor or in trust, were, of course, not subject to taxation,) it had the power, in the furtherance of the object for which the grant was made, to exempt such lands from ordinary taxation, and to provide for commuted taxation of both the railroad and the granted lands.

"There is not in the history of the State a single grant of lands to aid in the building of a railway, where this system of commuted taxation has not been adopted, and we have not found an instance, prior to the adoption of the constitutional amendment of 1871, (Const. Art. 4, sec. 32*a*,) where a commuted system of taxation was provided that did not apply to a land grant as well as to the railroad property. This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight."

It would seem from these decisions to have been the settled law of the State that it could, after the adoption of the Constitution of 1858, acquire title to lands and dispose of them subject to the same conditions under which the lands in controversy were granted to the plaintiffs in error.

In *McHenry* v. *Alford*, (168 U. S. 651,) legislation of the Territory of Dakota, providing for the taxation of the lands of the Northern Pacific Railroad Company on the basis of a percentage of the gross earnings of the railroad company, was held not in conflict with the mandate in the organic act that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed." While the language of this organic act is not the same as that of the Minnesota constitution, in that the Minnesota constitution by implication requires the taxation of all property except that by its terms specifically exempted, and this act makes no provision in respect to the matter of exemption; yet in respect to property subject to taxation it, like the Minnesota constitution, requires taxation in proportion to the value of the property taxed. It is doubtless true that it has been held that forbidding an exemption from taxation and requiring taxation according to the "true value in money" forbids taxation otherwise than in accordance with established general rules in respect to valuation and prevents a commutation on a different basis; yet there have been rulings of the Supreme Court of Minnesota to the effect that commutation is not the same as exemption, or forbidden by a constitutional provision which forbids exemption, and that it may sometimes be the surest way of reaching taxation according to the "true value in money," and is, therefore, not necessarily an infringement of a constitutional provision requir-

ing such taxation. Thus, in *County of Hennepin* v. *Railway Company*, (33 Minn. 534, 535,) the court said:

"This is not an immunity from taxation, but a commutation of taxes—another and substituted way prescribed by law, in which the respondent, as the owner of this land among other property, is to contribute its share to the public revenue."

And in *County of Ramsey* v. *Railway Company*, (Id. 537, 542):

"It was not in reality a plan for *exempting* property from taxation, but a substituted *method* of taxation. It must be supposed that it was contemplated that this system would, upon the whole, fairly effect the objects of taxation with respect to such corporations, and be equivalent in its results to taxation of the property owned by them."

So also in *County of Todd* v. *Railway Company*, (38 Minn. 163, 165):

"It has been considered that the purpose of such statutes has been, not to exempt property from taxation, but to provide a substituted method of securing to the State its proper revenue from the taxable property of these corporations. (*City of St. Paul* v. *St. Paul & Sioux City R. R. Co.*, 23 Minn. 469; *County of Hennepin* v. *St. Paul, M. & M. Ry Co.*, 33 Minn. 534, 535; *County of Ramsey* v. *Chicago, Mil. & St. Paul Ry Co., supra.*)"

And further, in *City of St. Paul* v. *Railway Company*, (39 Minn. 112, 113):

"As was said in *County of Ramsey* v. *Chicago, Mil. & St. Paul Ry Co., supra*, these charters do not exempt the property from taxes, but provide a substituted method of taxation, based upon the assumption that the property of the companies will be used for railroad purposes, and thereby an income be derived, the percentage of which received by the State will be equivalent in its results to taxation of the property."

And again, in *State* v. *Luther*, (56 Minn. 156, 160):

"It is a common error, in construing statutes like the present, to assume that because the commuted tax is fixed with reference to, and is wholly derived from, the gross earnings of the road, therefore the lands are exempted from taxation altogether. The percentage of the gross earnings is paid as taxes on both the railroad and the granted lands, and, although deprived wholly from the former, is a commutation tax alike on both."

The contract made in 1865 with the predecessor of the St. Paul and Duluth Railroad Company, void at that time but made valid by the constitutional amendment of 1871, (as by the Supreme Court of the State now affirmed,) commuted the taxes on all railroad properties, including its lands not used for railroad purposes, by the payment of three per cent. on its gross earnings. Confessedly after that amendment there existed a binding contract between the State and the railroad companies, by which the taxes on all their property were to be commuted and discharged on the payment of three per cent. of the gross earnings. If nothing had since occurred that contract, under the decision of the Supreme Court, would continue exempting lands not used, as well as lands used for railroad purposes, from

any other taxation than that which was expressed by three per cent. on the gross earnings of the companies. In other words, so far as the railroad companies are concerned, that constitutional amendment did away with the restrictive features of sections 1 and 3 of Article IX in the State constitution, and permitted and endorsed a peculiar method of taxation of railroad companies. The constitutional amendment of 1871 forbade any change by repeal or amendment of laws respecting the taxation of railroad companies except upon a vote of the people. The converse of that proposition may be accepted, to wit, that by a vote of the people the tax provision concerning railroads might be repealed or amended. But is there no limitation upon the power of amendment? The law of 1895 adopted by the people does not release railroad companies from the burden of paying three per cent. upon their gross earnings into the State treasury, but simply operates to put certain properties belonging to them outside of the protection of that commutation. Was such an amendment within the contemplation of the constitutional provision of 1871? It may seem a not unreasonable modification to exempt from the contract such property as is not used for railroad purposes, but would not the legislation assume a different aspect if it had subjected to ordinary taxation all the railroad property, except locomotives, and upon them continued the burden of the payment of three per cent. of the gross earnings? Of course, if there be no limitations in respect to the scope of amendment it would be within the power of the State to subject the bulk of the railroad property, whether used or not used for railroad purposes, to the burden of ordinary State taxation; and taking a single item like locomotives, without which the road could not be operated, continue upon the companies the duty of paying three per cent. of the gross earnings. While it may be that no such inconsiderate action is to be expected, the possibility of such action suggests a query whether the power of repeal or amendment, preserved by the constitutional amendment of 1871, has not some limitations.

Giving to that power full scope, it may be said that if the prior legislation was unauthorized by the constitution, a repeal of the amendment would wipe out the whole provision in reference to railroad taxation, and subject all railroad property within the limits of the State to the ordinary rule in respect to taxation. So it may be that the reserved power of amendment carries with it the right to increase or diminish the rate per cent. of taxation. But a different question is presented when it is insisted that the power of amendment carries with it the right of continuing the rate per cent. as to part only, but not all of the property covered by the original contract. For, as stated, if the State can withdraw the lands not used for railroad purposes from the scope of this contract commutation, can it not to-morrow likewise withdraw the lands which are used for railroad purposes, including therein the right of way, the tracks thereon, all

the grounds occupied by station houses, &c., and then, on the day thereafter, withdraw from it all the personal property of the companies, except their locomotives, and still hold the corporations to the burden of the contract? May it not be fairly contended that the privilege of amendment reserved was as to the rate, and not as to the property to be included within the commutation? That the power of amendment has its limitations, or rather that an amendment may not be wholly as to the right of the State, and absolutely ignoring the right of the other party to the contract, has been adjudged by this court in *Louisville Water Company* v. *Clark*, (143 U. S. 1.) In that case it was held that while under a statute the water company had been exempted from taxation on condition that it supplied water free to the city of Louisville, an act withdrawing that exemption from taxation, although silent as to the corresponding obligation of the water company, must be construed as releasing it from an obligation based upon such exemption. So it may well be said in the case before us that a contractual exemption of the property of the railroad company in whole, upon consideration of a certain payment, cannot be changed by the State so as to continue the obligation in full, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract.

But there is another matter of significance. The lands in controversy were granted by Congress to the State as trustee. The act of 1865, by which the State offered the lands to the predecessor of the St. Paul and Duluth Company, is entitled "An act to execute the trust created by the act of Congress." The right of a State to accept such a trust cannot now be doubted. It has become a part of the judicial history of the country. These lands were not donated by Congress to the State, to be used by it for its own benefit and in its own way, but were conveyed to the State in trust with the understanding that, as trustee, it should use them in the best possible manner for accomplishing the purposes of the trust. Of course, this implied that, except as restrained by its own powers, the State should make the grant as valuable as possible for the accomplishment of the purpose of the trust. Under those circumstances the peculiar nature of the trust created enabled the State to determine the limits and mode of taxation to which that property thus placed in its hands should be subjected. It might have provided that the title be retained by the State, that no conveyance be made to the railroad company, and that the first and only conveyance should be when the railroad company had made a contract with some individual for its purchase, and that contract had been completed by full payment to the company. Is it to be doubted that the State, retaining the title, although authorizing the railroad company to sell, could, while that title was so retained, hold it free from any kind of taxation? Would it not

be a legitimate and appropriate discharge of the trust conferred if the State adjudged that such property should be held in its own name free from all taxation until such time as its full value in cash could be obtained from some individual? If the State could retain the title free from taxation until such time as its disposition to a private purchaser enabled the railroad company to realize the full value of the land, was it not also within its power to say that a temporary transfer to the corporation charged with the duty of constructing the railroad should also be accompanied by a like exemption from taxation? And if it could exempt from all taxation, it might with equal propriety say that it should be subjected to taxation in only a limited way.

Of course, it may be said, and in a general way rightfully so, that the powers of the legislature of a State are limited by its constitutional provisions. It follows therefrom that in dealing with property generally the legislature must, in respect to taxation, as in all other matters, keep within the express constitutional limits as interpreted by the highest court of the State. We would not weaken, even if we had authority so to do, the full scope of this constitutional obligation. Whatever the people, framing their organic act, have declared to be the limits of legislative power, and the modes in which that power shall be exercised, must always be recognized by the courts, State and national, as obligatory. And if the property in controversy was that which passed directly into the mass of the general property of the State it might properly be said that the construction placed on constitutional limitations by the Supreme Court of the State determined absolutely for all courts, State and national, the full scope of the legislative power.

And in this respect we may notice the suggestion of the Supreme Court of the State, that other lands than these might be withdrawn from the general rule of taxation provided by the State constitution, and the statement made by counsel in argument that many corporations had received in the early days of the State commutations based on a like principle. We quote the language of the Supreme Court:

"It is further claimed on behalf of the appellants that the mandates and inhibitions of the constitution as to the taxation of all private property have no application to public lands which passed into private ownership with the privilege of commuted taxation created with respect to them while they were yet public lands. If this proposition is true, then the legislature, if there are no other constitutional provisions prohibiting it, may provide for exempting from taxation the school lands of the State after their sale and after they have become absolutely private property, or provide that the owners thereof may forever pay a percentage on the gross or net income derived therefrom in lieu of all other taxes.

"The mandate of the constitution applies to all property which is the subject of private ownership, without reference to the source of its acqui-

sition. It would be a palpable evasion of the constitution to permit the legislature to absolutely transfer public lands to private owners vested with the privileges and immunities as to taxation which are prohibited by the constitution."

We think the apprehension of the Supreme Court is one more of imagination than of fact. It is true that Congress might act so as in effect to keep withdrawn a large area of the State from taxation. Under the reservation in the act of admission and the acceptance thereof by the State of Minnesota the right of Congress to determine the disposition of public lands within that State was reserved, and, according to the decision in *Van Brocklin* v. *State of Tennessee, infra*, lands belonging to the United States are exempt from taxation by the State. So that if Congress should determine that the great body of public lands within the State of Minnesota should be reserved from sale for an indefinite period it might do so, and thus the lands be exempted from taxation; and yet it cannot be imputed to Congress that it would discriminate against the State of Minnesota or pass any legislation detrimental to its interests. It had the power to withdraw all the public lands in Minnesota from private entry or public grant, and, exercising that power, it might prevent the State of Minnesota from taxing a large area of its lands, but no such possibility of wrong conduct on the part of Congress can enter into the consideration of this question. It is to be expected that it will deal with Minnesota as with other States, and in such a way as to subserve the best interests of the people of that State. That a power may be injuriously exercised is no reason for a misconstruction of the scope and extent of that power. So the fact that Congress might, if it saw fit, withdraw the public lands in Minnesota from sale, and thus prevent their taxation, furnishes no reason for denying the efficacy of the power to grant such lands, subject to conditions binding upon the State, or the right of the State, as its trustee, to prescribe limitations upon taxation. And this must be said bearing in mind that to the full extent there is no question of the duty of the legislature of Minnesota to subject any but trust property to the absolute scope of its constitutional provisions in respect to the matter of taxation. And in respect to the lands in controversy it must be remembered that they were granted to and accepted by the State in trust, and it cannot be doubted that the State has the power to compel its grantee to use the lands in furtherance of the trust and prevent it from creating a large and permanent ownership of lands.

When Minnesota was admitted into the Union, and admitted on the basis of full equality with all other States, there were within its limits a large amount of lands belonging to the national government. The enabling act, February 26, 1857, (11 Stat. 166,) authorizing the inhabitants of Minnesota to form a constitution and a State government, tendered certain

propositions to the people of the Territory, coupled in section 5 with this proviso (11 Stat. 167):

"The foregoing propositions herein offered are on the condition that the said convention which shall form the constitution of said State shall provide, by a clause in said constitution, or an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title in said soil to *bona fide* purchasers thereof; and that no tax shall be imposed on lands belonging to the United States, and that in no case shall non-resident proprietors be taxed higher than residents."

And in article 2, section 3, of the constitution, passed by virtue of this enabling act, reads as follows (Gen. Stat. Minn. 1894, p. lxxiv):

"The propositions contained in the act of Congress entitled 'An act to authorize the people of the Territory of Minnesota to form a constitution and State government preparatory to their admission into the Union on an equal footing with the original States,' are hereby accepted, ratified and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title to said soil to *bona fide* purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall non-resident proprietors be taxed higher than residents."

That these provisions of the enabling act and the constitution, in form at least, made a compact between the United States and the State, is evident. In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two States, or between a State and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a State to deal with the nation or with any other State in reference to such property. The case before us is one involving simply an agreement as to property between a State and the nation.

That a State and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new

States, as well as subsequently thereto, is a matter of history. Section 10 of article 1 of the Constitution provides that "no State shall, without the consent of Congress, . . . enter into any agreement or compact with another State." It was early ruled that these negative words carried with them no denial of the power of two States to enter into a compact or agreement with one another, but only placed a condition upon the exercise of such power. Thus in *Green* v. *Biddle*, (8 Wheat. 1,) a compact between Virginia and Kentucky was sustained, and it was held no valid objection to it that within certain restrictions it limited the legislative power of the State of Kentucky. In *Poole* v. *Fleeger*, (11 Pet. 185,) an agreement between Kentucky and Tennessee as to boundary was upheld, Mr. Justice Story, speaking for the court, saying (p. 209):

"It cannot be doubted that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretense of such a geneneral surrender of the right, that it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress. The Constitution declares that 'no State shall, without the consent of Congress, enter into any agreement or compact with another State,' thus plainly admitting that, with such consent, it might be done, and in the present instance that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States."

The same doctrine was announced in *Virginia* v. *Tennessee*, (148 U. S. 503,) and in the opinion in that case it was intimated that there were many matters in respect to which the different States might agree without the formal consent of Congress. In this case the difference between the agreements which States might enter into between one another and those from which they were debarred without the consent of Congress was noticed, and it was said (p. 518):

"There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed

essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that State in that way. If the bordering line of two States should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in draining the district and thus removing the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply? . . .

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries, (sec. 1403,) referring to a previous part of the same section of the Constitution, in which the clause in question appears, observes that its language 'may be more plausibly interpreted from the terms used, "treaty, alliance or confederation," and upon the ground that the sense of each is best known by its association (*nocitur a sociis*) to apply to treaties of a political character, such as treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;' and that 'the latter clause, "compacts and agreements," might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other.' And he adds: 'In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.'"

If as "a part of the general right of sovereignty" to which Mr. Justice Story refers in the quotation above made, the right of agreement between one another belongs to the several States, except as limited by the constitutional provisions requiring the consent of Congress, equally true is it that a State may make a compact with all the States, constituting as one body the nation, possessed of general rights of sovereignty and represented by Congress. That Congress has consented is shown by the fact that it proposed the terms of the agreement and declared the State admitted on its assent to those terms.

The Constitution, article 1, section 8, provides that—

"The Congress shall have power to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings."

By an act of February 22, 1875, the legislature of Kansas ceded to the United States jurisdiction over the territory of the Fort Leavenworth Military Reservation, reserving not only the right to serve civil and criminal process, but also the right to tax railroad, bridge and other corporations, their franchises and property, within the limits of the reservation. And in *Fort Leavenworth Railroad Company* v. *Lowe*, (114 U. S. 525,) that cession was held valid, Mr. Justice Field, delivering the opinion of court, saying in reference to this question (p. 541):

"In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the State, they are not those of a different country; and the two, the State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution."

The act admitting Kansas into the Union contained in its first section this provision (12 Stat. 127):

"That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, . . . or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property or other rights, by treaty, law or otherwise, which it would have been competent to make if this act had never been passed."

Under the provisions of the treaty of 1854, between the Shawnee Indians residing within the territory of Kansas and the United States, certain of their lands were allotted to individual members and patented to them, with the express restriction that "the said lands shall never be sold by the grantee, or his heirs, without the consent of the Secretary of the Interior." In the case of *The Kansas Indians*, (5 Wall. 737, 757,) this court, holding a law of the State of Kansas subjecting these lands to taxation invalid, said:

"There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired, and the general government at

liberty to make any regulation respecting them, their lands, property or other rights, which it would have been competent to make if Kansas had not been admitted into the Union. . . . While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it. She accepted this status when she accepted the act admitting her into the Union." See also *Beecher* v. *Wetherby*, (95 U. S. 517, 523.)

But we need not go outside of the present case. The State of Minnesota accepted the trust created by the act of Congress. Acceptance by a trustee of the obligations created by the donor of a trust completes a contract. Such contracts, as we have seen, have been frequent in the history of the nation, and their validity has not only never been questioned but has been directly affirmed. (*Tucker* v. *Ferguson*, 22 Wall. 527.)

There is nothing in the case of *Van Brocklin* v. *State of Tennessee*, (117 U. S. 151,) in conflict with these views. In that case it was held that property of the United States, situated within the limits of a State, was exempt by the Constitution of the United States from taxation by that State; and while, referring to the many exemption clauses in different acts of admission of States, it was said that they were but declaratory of the law and conferred no new right or power on the United States, it was not held that if in the absence of such exemption clauses the lands of the United States would have been subject to taxation, the compact thereby created would not have been operative to relieve them. And it must be remembered that the question here is not as to exemption, but as to full control over the matter of sale and disposal.

Returning, then, to the facts of the case before us, by the provisions quoted the State expressly agreed that no tax should be imposed on lands belonging to the United States, that it should never interfere with the primary disposal of the soil within the State by the United States, or with any regulations Congress might find necessary for securing the soil to *bona fide* purchasers thereof. These provisions are not to be construed narrowly or technically, but as expressing a consent on the part of the State to the terms proposed by Congress; and among these terms were that the full control of the disposition of the lands of the United States should be free from State action. Whether Congress should sell or donate; what terms it should impose upon the sale or donation; what arrangements it should make for securing title to the beneficiaries—were all matters withdrawn from State interference by the terms of the enabling act and the Constitution. With this full reservation of power in Congress it is not open to doubt that that body might have made such disposition of the public lands of the United States within the State as would withhold them from the burdens of State taxation, not only until such time as all interest of the United States in the lands had ceased, but

also until they had been used to fully accomplish the purposes for which Congress was selling or donating them.

It is true, as has been held in the ordinary administration of the affairs of the land department, that whenever full payment has been made to the United States, and the full equitable title has passed to an individual purchaser or homesteader, the mere delay in furnishing to such purchaser or homesteader the legal evidence of his title does not relieve the land from ordinary State taxation. (*Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496; *Northern Pacific R. R. Co.* v. *Patterson*, 154 U. S. 130.)

But it has also been held that until the very last moment that liens or equitable rights of the United States are extinguished, no matter how trivial or small may be the right or the lien reserved, the land is not subject to State taxation. (*Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444; *Colorado Company* v. *Commissioners*, 95 U. S. 259; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496.)

But whatever may be the rule applicable in the ordinary administration of affairs in the land department, the provisions of the enabling act and the State constitution, before referred to, secure to the United States full control of the disposition of the public lands within the limits of the State. Within the scope of this reserved power Congress might grant to a railroad corporation public lands to aid in the construction of its road, withholding not only the legal title, but also exemption from State taxation until such time as some one should pay into the treasury of the company the full value of the land in money to be used in the construction of its road. It would be a part of the power reserved in Congress to determine the terms and conditions upon which title should effectually pass from the government. If Congress has a right to make a private corporation its agent to thus utilize to the fullest extent the value of the land it is willing to give to aid a public enterprise, it may deal with a State upon the same basis. The State, accepting the trust given by Congress, has all the powers of a trustee, and must have also all the freedom of a trustee, and may determine in what way that trust may be most successfully carried out. The mere fact that the legal title has passed by act of Congress from the nation to the State is not the vital fact. Under section 3, article IX, of the State constitution public property used exclusively for any public purpose is exempted from taxation. It is undoubtedly true as a general rule that a State does not tax its own property, but we not rest on this express language of the State constitution. We place our conclusion upon higher grounds. Accepting this property as a trustee, as it had a right to do, it was not compelled to weaken the full accomplishment of that trust by subjection of the lands to taxation.

We do not mean to hold that it was bound to exempt the land, either permanently or for any specified time, from taxation if in its judgment as trustee it believed that the purpose of the trust could be otherwise fully and fairly accomplished; and to that extent, and no further, goes the opinion in *Tucker* v. *Ferguson, supra.* In that case the State saw fit to tax the land after the lapse of a certain time, in respect to which Congress had prescribed an exemption, and it was said by Mr. Justice Swayne, on page 572:

"She was in nowise fettered, except as she had agreed to fulfil all the terms and conditions which accompanied the grant. To that extent she was clearly bound, and anything in conflict with those conditions would be *ultra vires* and cannot be supported. What were the terms to which she submitted herself? She was to devote the lands to the accomplishment of the object which Congress had in view, and there was an implied agreement on her part to take all the measures reasonably within her power to make their application effectual to that end. The mode was left entirely to herself. We see no ground upon which it can be claimed she bound herself any further."

But, if in its judgment, as trustee, the trust could be most effectually accomplished by transferring the lands to some corporation, subject to only a limited taxation until such time as the full value of the lands could be secured for the purposes of the trust, it was not prevented from so doing by any obligation which it was under in respect to the general mass of property within the State. When the State accepted the position of trustee it had all the freedom of judgment which belongs to a trustee in respect to the best means of carrying the trust into execution. The legislature was the body representing the State, whose judgment was invoked as to such means, and its action was taken not so much in discharge of its constitutional obligations to the people as of its contract obligations as trustee to the grantor of the trust. In other words, the State either could not accept the trust, or accepting it was entitled to all the freedom of judgment which attends the action of a trustee, and, as we have seen, it is too late in the history of railroad aid legislation in this country to hold that a State cannot accept the position of trustee of such a grant.

Congress, acting for the United States—the owner of the lands—could, by virtue of the compact with the State, have in creating the trust provided specifically for an exemption, or for taxation in a limited way. Having failed to so prescribe the manner in which the trust should be executed, the power became vested in the trustee, the State, and it exercised it in the way indicated by the legislation of 1865 and 1870. Having that power as trustee, it could make a valid contract in respect thereto with the corporations, and they, investing their money in the construction of the road on the faith of the contract tendered and accepted, are entitled to be protected against any subsequent legislative impairment in respect thereto.

For these reasons we are of opinion that there was a valid contract made with these companies in respect to the taxation of these lands—a contract which it was beyond the power of the State to impair; that this subsequent legislation does impair that contract, and cannot, therefore, be sustained.

The judgment of the Supreme Court of Minnesota is reversed, except as to lands belonging to the Great Northern Railway Company, and the case is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BROWN concurred upon the ground that the legality of commuting the payment of taxes upon railway property by a payment of a percentage upon the gross earnings, having been recognized by the legislature and the Supreme Court of Minnesota for thirty years, and also having been recognized as valid in the constitutional amendment of 1871, it is too late to set up its repugnance to the State constitution as against railways which were built upon the faith of its validity.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 20.—October Term, 1900.

Fred Stearns, as County Auditor of Aitkin County, Minnesota, Plaintiff in Error, *vs.* The State of Minnesota on the Relation of James N. Marr.	In error to the Supreme Court of the State of Minnesota.

[December 3, 1900.]

Mr. Justice White, with whom concurs Mr. Justice Harlan, Mr. Justice Gray and Mr. Justice McKenna, assenting to the judgment of reversal.

The act which was accepted by the corporation, and which is now decided to be an irrevocable contract protected from impairment by the Constitution of the United States, in substance provided that in lieu of all other taxes upon its property of every kind and nature, whether real or personal, the railroad company should annually pay a fixed gross receipt tax of three per cent. It, however, provided that the public lands which the State had received from the United States, and which it had given to the corporation to aid in the construction of its railroad, might be taxed by the State in addition to the three per cent. gross receipt tax whenever the corporation had parted with its title to such property. When this gross receipt tax was enacted the constitution of the State commanded that taxation should be equal and uniform, and that property should be assessed according to valuation. In addition express authority was given to exempt from taxation certain enumerated classes of property, such as universities, schools, churches, burying grounds, &c. From this it resulted that the legislature was deprived of the right to exempt persons or property in any case unless embraced in the classes as to which the power to exempt was specifically granted as above stated. This is not disputed. It follows then that if the gross receipt tax was an exemption it was void, because repugnant to the constitution of the State. If so void, it did not create a contract, within the contract clause of the Constitution of the United States, for rights protected from impairment could not flow from an act which had no legal existence. The conclusion then that the act which imposed the gross receipt tax created a contract protected from impairment by the Constitution of the United States must rest on the premise that such act was not an exemption. To this proposition I cannot give my assent.

True it is that in *McHenry* v. *Alford*, (168 U. S. 651,) a territorial legislative act, which taxed a railroad corporation by a levy on its gross receipts, was decided not to be a violation of the organic act of the territory which commanded that taxation should be uniform, and that all property should be assessed by a method of valuation. But in that case no question of contract was involved, and the issue presented and the one decided was that the territorial legislature, in selecting a gross receipt tax as the method for reaching railroad property, did not necessarily violate the organic law of the territory as to uniformity and valuation. But this ruling is inapposite to the present case, where the question is not whether the legislature of Minnesota was empowered by the constitution of that State to provide that railroad property should be taxed by a gross receipt tax, but whether, conceding the legislature had the authority to enact such a tax as to railroads or any other class by it selected, it possessed the additional power to enter into an irrevocable contract, by which the method thus selected as to the persons and property designated should be forever thereafter continued.

It seems to me the moment it is admitted that the gross receipt tax is an irrevocable contract, thereby it necessarily results that an exemption from taxation was provided for. The object of forbidding exemptions from taxation is not alone to secure revenue, but is to preserve untrammeled by contract the fulness of all the lawful power of taxation in the successive repositories of such power. In other words, forbidding exemptions in terms directs that no one legislature shall by contract limit the lawful rights of its successors, by taking particular property out of the legislative authority to tax, on the assumption that such persons or property are thereafter to be governed by a contract which exempts from all future exercise of the legislative power of taxation. This seems so obvious that I cannot find words to express the thought that a particular person or property is irrevocably taken, by contract, beyond the reach of the legislative right to tax by any lawful mode deemed from time to time to be best for the public interest, without at the same time saying that by such an irrevocable contract an exemption from taxation is created.

Nor does it seem to me that the decisions of the Minnesota courts, which are referred to as showing that under the constitution of that State it was competent for the legislature to enact a gross receipt tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. In no single one of these cases was the question of irrepealable contract presented, considered or decided in any form. Undoubtedly some of these decisions held that a gross receipt tax was valid, just as it was so held in *McHenry* v. *Alford, supra.* But, as I have said to decide that the general assembly of Minnesota could select a gross receipt tax without violating the rule of uniformity or the requirement of

valuation, did not involve the question whether one legislature in exercising its discretion as to such subjects could in addition impose by an irrepealable contract its action on the succeeding legislatures of the State.

The first case which arose in Minnesota, in which the question whether the levy of a gross receipt tax and the acceptance of the terms of the act by a corporation made an irrepealable contract, is the one now here, and there can be no question that the Supreme Court of Minnesota has declared unequivocally that the element of irrevocable contract, if upheld, would cause the act or acts to become exemptions, and therefore repugnant to the constitution of the State. Even if, however, the Minnesota decisions, prior to the one now before us, had the import which is deduced from them, in my opinion they would not be decisive of this controversy. The decisions in question were not rendered prior to the enactment of the gross receipt tax, which is here in controversy, and therefore it cannot be argued that they entered into and formed a part of such act. In adjudging whether a contract has been impaired by subsequent legislation, it is elementary that this court determines for itself whether there was a contract. Whilst it is true that in making such inquiry the persuasive power of State decisions will be taken into view, nevertheless the duty ever remains to determine independently whether the contract existed which it is asserted has been impaired. Discharging such duty in this case, in view of the provisions of the constitution of the State of Minnesota, my mind cannot be persuaded to the conclusion that an agreement is not an exemption by which a particular person or property is forever, as regards taxation, by irrevocable contract, exempted from the general rules of taxation.

Nor can I agree because the State of Minnesota received public land from the United States to be used to aid in the construction of a railroad, the general assembly of that State was thereby endowed with the attribute of dealing with such land in violation of the constitution of the State. The constitution of the State was the measure of the powers of the legislature of Minnesota, and in our system of government I do not conceive that Congress can confer upon a State legislature the right to violate the constitution of the State. True it is that in taking the land a relation of trust was engendered, by which the obligation arose to devote the lands to the purpose for which they had been entrusted by Congress to the State. But this it seems to me can only signify that the State of Minnesota, through its legislature, was obliged to use the lands in furtherance of the trust, in accordance with the powers and under the restrictions imposed by the constitution of the State. Whilst this reasoning is alone to my mind sufficient to refute the theory that the gift by Congress could endow the general assembly with power to disregard the constitution of the State, even if Congress had so expressly directed, the conclusion is cogently reinforced

when it is considered that no provision was made by Congress in giving the lands to the State, that in using such lands for the purposes specified in the grant the State should exempt them by irrevocable contract from taxation. Even if it be conceded *arguendo* only that such a power could have been lawfully imposed, its exercise ought not to be implied in order thereby to prevent the legislature of the State from using its taxing authority free from the restraints of an irrevocable contract. But again, if it be conceded that Congress could lawfully have authorized the legislature of the State of Minnesota to violate the constitution of that State, and even if it be granted that Congress did so, these concessions should not affect the decision of this case. For if such power existed, it could only relate to lands given by the United States, and not to all the other real and personal property of the railroad, which came not from the grant by the United States to the State. But the irrevocable contract which is now decided to have been lawfully made by the general assembly of the State of Minnesota was not one dealing only with the lands given by the United States, but was one relating to all the property of the railroad. To enforce its obligations therefore, under the assumption of a trust as to lands given by the United States, is to restrain the power of the State by contract as to property within its borders, not received from Congress, not embraced by the trust, and over which the plenary taxing power of the State extends.

Because the provision as to the lands given by Congress to the State is indivisibly united with the other provisions contained in the gross receipt tax law, it does not follow that that which is confessedly repugnant to the constitution of the State should be held to be valid; but it should rather, I think, be decided that the vice which affects a part, and which cannot be separated, operates upon the contract as an entirety and causes the whole to be void.

Although I dissent, for the foregoing reasons, from some of the grounds stated in the opinion of the court, I yet concur in the judgment of reversal upon one ground expressed therein. Conscious that nothing is needed to strengthen the conclusive reasoning by which the proposition is sustained in the opinion of the court, nevertheless, as the question presents itself to my mind in a somewhat different aspect from that considered by the court, the additional grounds which cause me to concur will now be stated.

In 1871 an amendment to the constitution of Minnesota, which is set out in the opinion of the court, was adopted by a vote of the people. The opinion of the Supreme Court of Minnesota in the case at bar holds that the effect of that amendment was to ratify and confirm the gross receipt tax laws and to deprive the general assembly of all power to repeal or amend such laws, unless the legislative act so doing was submitted to and ratified by a vote of the people. Accepting this construction as conclusive, it follows that the gross receipt tax laws, even if they contained a grant of exemption, were no longer in violation of the constitution of the State, but

did not evidence irrevocable contracts, since they were subject to repeal or amendment by a legislative act approved and ratified by a vote of the people. This suit rests upon an act of the general assembly of Minnesota, approved by the people in 1896, which it is claimed was the first act which repealed or amended the gross receipt tax law relating to the rights of the corporation now here, to the extent that it provided that the public lands given to the railroad should be taxed before the corporation had parted with its title. Before examining the scope of the act relied upon, it is important to bear in mind the relations which are engendered when a contract is entered into by a State subject to the reserved power to repeal, alter or amend. In such case no irrepealable contract, protected from impairment under the Constitution of the United States, takes effect, because it is impossible to conceive that contract rights which are conferred subject to the power of repeal, alteration or amendment are protected from an impairment which under the terms of the grant the State has reserved a right to make. (*Louisville* v. *Bank of Louisville*, 174 U. S. 439, 444; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S. 636, 644, *et seq.*)

But whilst this is settled, it has also been equally determined that the reserved right to repeal, alter or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guarantee against the taking of property without due process of law. *St. Louis, Iron Mountain &c. Railway* v. *Paul*, (173 U. S. 404, 408, and cases cited.) And an apt illustration of the application of this doctrine is found in *Louisville Water Co.* v. *Clark*, (143 U. S. 1.)

Will, then, the enforcement of the amendatory act, which is here relied upon, providing for the taxation of the lands, before the corporation had parted with its title to them, in spite of the continued exaction of the gross receipt tax, deprive the corporation of its property without due process of law, or deny to it the equal protection of the laws? The repealing act says:

"SEC. 1. All lands in this State heretofore or hereafter granted by the State of Minnesota or the United States or the Territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this State, except such parts of said lands as are held, used or occupied for right of way, gravel pits, side tracks, depots, and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies."

But these provisions, which in and of themselves are clearly an amendment of the gross receipt tax laws, are accompanied by the following proviso:

"Provided, that said railroad companies shall continue to pay taxes into the State treasury upon their gross earnings *in the same manner* and *in the same amount* as is now provided by law, and that nothing in this act contained *shall be construed to repeal said laws*, except in so far as the same relate to the tax upon said lands." [Italics are mine.]

Considering for a moment the ratified agreement which the gross receipt tax law embodied, it is patent that the duties which it imposed and the obligations to which it gave rise were in the strictest sense reciprocal or commutative; that is, that the agreement to pay the gross receipt tax, and necessarily the amount of those taxes, was predicated on the obligation on the part of the State to regard the payment of said tax as the discharge by the corporation of all taxes due upon all its real or personal property. The amendatory act, therefore, whilst increasing the sum of the obligation of the corporation to the State to the extent that the lands are no longer to be represented by the gross receipt tax, yet at the same time retains in favor of the State the right to take the whole amount of the stipulated payment of the gross receipt tax in the same manner as theretofore, that is, by the contract. That is to say, the amendatory act preserves the contract in favor of the State as an entirety, by retaining all the obligations due by the railroad to the State, and yet purports to repeal, alter or amend the contract by relieving the State from its obligation to the corporation to include all the property of the latter for the purpose of taxation by a gross receipt tax, which was the consideration upon which the obligation of the corporation to pay such tax rested. This consequence is made certain by the provision that the gross receipt tax, despite the amendment, shall remain payable *in the same amount*, and *in the same manner* as before the passage of the amendatory act, and is additionally made evident by the provision of the amendatory act declaring that it *"shall not be construed to repeal"* the gross receipt tax act. The situation created by the amendatory act may be thus illustrated: The State leases a building to it belonging for a term of years, conditioned on the payment of a stipulated amount of rent annually. The consideration of the obligation of the lessee to pay in such case would of course be the right of occupation granted by the State, and the continued right of the State to collect the rent would depend upon the enjoyment by the tenant of the right of occupation which the contract granted. Now, then, if in such a contract the power was reserved to repeal, alter or amend, and it was exercised by declaring that the right of occupation should cease, but that the duty to pay the rent should continue in the same amount and in the same manner stated in the contract, and that nothing in the amendatory act should be construed as relieving the lessee from the duty to pay the whole of the stipulated rent, a condition strictly analogous to that which arises from the amending act relied on in the case at bar would be presented.

My understanding does not permit me to doubt that to preserve in this case the contract in its entirety, so far as the rights of the State are concerned, and at the same time to destroy the reciprocal duty owed by the State to the other contracting party, is not to repeal, alter or amend the

contract at all, but, whilst preserving it, to endeavor by an act of arbitrary power to impose a burden incompatible with the very provisions and terms of the amendatory act itself. As has been previously said, the consideration of the contract obligation of the corporation to pay the gross receipt tax was the duty on the part of the State to consider such payment as a discharge of all taxes upon all the real and personal property of the corporation. The agreements being thus interdependent are of necessity indivisible, and to retain the entire duty or right of one party to the contract must lead to the preservation of the corresponding and reciprocal right or duty of the other. In reason, the argument comes to this, that the act purporting to amend, on its face cannot be declared to have done so, without concluding at the same time both that it did alter, repeal and amend, and that it did not. Under these circumstances, to enforce the amendatory act would necessarily be to deny to the corporation the equal protection of the laws, since it would leave the corporation subject to taxation, not by the general laws of the State, but by the provisions of a contract, and at the same time subject the corporation to a burden wholly incompatible with its liability under the contract. It would be a denial of due process of law to the corporation, since it would be but the recognition of the right of the State, without hearing and without process of any kind, to condemn the corporation to the performance of a duty alleged to be resting on it, and at the same time retain in favor of the State as against the corporation an obligation wholly at variance and in absolute conflict with the supposed duty arbitrarily declared by the amendatory act to rest upon the corporation.

True copy.

Test:

Clerk Supreme Court, U. S.